152 US 436

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RECORD, CASE NO. 15090.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO., ~~1120~~. 779

THE UNITED STATES, APPELLANT,

vs.

THOMAS P. BASHAW.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED JULY 23, 1892.

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1 Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the May session, 1892, of the October term, 1891, of said court, begun and held at the United States court-house in the city of St. Louis, Missouri, on the first Monday in May, to wit, the second day of May, A. D. 1892, before the honorable Henry C. Caldwell and honorable Walter H. Sanborn, circuit judges, and honorable Oliver P. Shiras, district judge.

Attest:

[SEAL.] JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the fifteenth day of September, A. D. 1891, a transcript of record in pursuance of an appeal allowed by the circuit court of the United States for the eastern district of Missouri was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, which transcript of record is in the words and figures following, to wit:

2 (A) The United States of America to Thomas P. Bashaw, greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an appeal allowed by the circuit court of the United States for the eastern division of the eastern judicial district of Missouri, wherein the United States is appellant and you are respondent, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the honorable Amos M. Thayer, judge of the circuit court of the United States for the eastern district of Missouri, this tenth day of September, in the year of our Lord one thousand eight hundred and ninety-one.

AMOS M. THAYER,
United States District Judge for the Eastern District of Missouri.

Service of within upon Thomas P. Bashaw, plaintiff, is hereby waived.

KRAPP & HARRIS,
Att'ys for Plaintiff.

SEPT. 12TH, 1891.

(Indorsed:) No. 3503. United States circuit court, eastern division of the eastern judicial district of Missouri. Thos. P. Bashaw vs. United States. Citation. Filed 10th day of Sept., 1891. A. P. Selby, clerk.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In the circuit court of the United States, in and for the eastern division of the eastern judicial district of Missouri.

Be it remembered, that on the 20th day of November, A. D. 1890, there was filed in the office of the clerk of said court a certain petition entitled Thomas P. Bashaw vs. The United States.

And on said twentieth day of November, 1890, there was filed in said cause an affidavit of service, in words and figures following, to wit:

Affidavit of service.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss:

Thomas M. Knapp, attorney for Thomas P. Bashaw, being duly sworn, on his oath states that he has this day filed in the clerk's office of the United States circuit court for the eastern division of the eastern judicial district of Missouri the petition in the case of Thomas P. Bashaw against the United States, being number 3503 upon the records of said court; that he has served a copy of the same upon George D. Reynolds, attorney of the United States for the eastern district of Missouri; and
3 that he has this day mailed, by registered letter, a copy of said petition to the Attorney-General of the United States.

THOMAS M. KNAPP.

Subscribed and sworn to before me this twentieth day of November, A. D. 1890.

[SEAL.] A. P. SELBY,
Clerk of the United States Circuit Court,
Eastern Division, Eastern Judicial District of Mo.,
By GEO. F. HAID,
Deputy.

Registered letter No. 8614, P. O., Saint Louis, Mo. Received Nov. 20, 1890, of Thomas P. Bashaw, Fagan Building, a letter addressed to the Hon. Attorney-General, Washington, D. C. John B. Harlow, P. M.

And afterwards, to wit, on the thirteenth day of April, A. D. 1891, there was filed in said cause an amended petition, in words and figures following, to wit:

Amended petition.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss:

In the circuit court of the United States for the eastern division of the eastern judicial district of Missouri.—September term, 1890.

THOMAS P. BASHAW, PLAINTIFF,
vs.
THE UNITED STATES, DEFENDANT. } No. 3503. Amended petition.

Plaintiff, by leave of court first had and obtained, files this, his amended petition herein.

Plaintiff states that his full name is Thomas P. Bashaw, and that he resides in the city of St. Louis, in the State of Missouri, and that at the time the services hereinafter mentioned were rendered he was the duly appointed, commissioned, and qualified attorney of the United States for the eastern district of Missouri.

Plaintiff further states that on the 8th day of August, 1887, one William H. Bliss, then late United States district attorney for said district, instituted an action in this court for fees for services to the United States as district attorney, and that this plaintiff appeared in said suit as the attorney of the United States, and conducted and managed the defense to said action till the 27th day of March, 1885, when the same was finally disposed of, and final judgment therein rendered, whereby defendant became and was indebted unto this plaintiff in the sum of five hundred dollars.

That afterwards, to wit, on the 3rd day of April, 1889, this plaintiff duly made out and submitted his claim for charges, expenses, and fee for his said services in and about said suit, in said sum of five hundred dollars, to the judge of the district court for the eastern district of Missouri, and the same was duly certified by him, and afterwards, to wit, on the 8th day of April, 1889, plaintiff presented the same to defendant in its Department of Justice to the Attorney-General, but defendant, by its said Department, wrongfully neglected and refused to pay the same, or
31½ certify the same for payment, wherefore plaintiff prays for judgment against the defendant in the said sum of five hundred dollars, and for his costs of suit in this behalf expended.

And for another and further cause of action plaintiff states that his full name is Thomas P. Bashaw, and that he resides in the city of St. Louis, in the State of Missouri, and that at the time the services hereinafter mentioned were rendered he was the duly appointed, commissioned, and qualified attorney of the United States for the eastern district of Missouri.

Plaintiff further states that on divers days, between and including the 28th day of January, 1887, and the 1st day of July, 1888, the collector of internal revenue for the first collection district of Missouri reported to this plaintiff, as district attorney, divers and sundry cases, an itemized account of which is hereto attached and marked Exhibit A, and made a part hereof, as cases in which fines, penalties, and forfeitures had been incurred, in the eastern district of Missouri, for alleged violations of the internal-revenue laws of the United States; whereupon plaintiff inquired into and examined such cases, and upon such inquiry and examination he, as such district attorney, decided that proceedings therein could not probably be sustained, and that the ends of justice did not require that such proceedings should be instituted, and he thereupon made report of the facts in such cases to the Commissioner of Internal Revenue for his direction; whereupon defendant became and was indebted unto plaintiff for his expenses incurred and services rendered in said cases in the sum of five dollars for each case, to wit, in the sum of eight hundred and twenty-five dollars.

That afterwards, to wit, on the 2nd day of March, 1889, this plaintiff duly made out and submitted his claim for said expenses incurred and services rendered in said cases, in said sum of eight hundred and twenty-five dollars, to the district judge of the said eastern district of Missouri, and the same was duly allowed and certified by him, and afterwards, to wit, on the day of , 188 , this plaintiff duly presented said claim for payment to defendant in its Department of the Treasury to the accounting officers of the Treasury, but said defendant, by its said Department, wrongfully neglected and refused to pay the same.

Wherefore plaintiff prays judgment against the defendant, upon the facts and the law, in said sum of eight hundred and twenty-five dollars, and for his costs of suit in this behalf expended.

And for another and further cause of action plaintiff states that his full name is Thomas P. Bashaw, and that he resides in the city of St. Louis, in the State of Missouri, and that at the time the services hereinafter mentioned were rendered he was the duly appointed, commissioned, and qualified attorney of the United States for the eastern district of Missouri.

Plaintiff further states that on divers days, between and including the 1st day of July, 1888, and the 31st day of December, 1888, the collector of internal revenue of the first collection district of Missouri reported to this plaintiff, as district attorney, divers and sundry cases, an itemized account of which is hereto attached and marked Exhibit B, and made a part hereof, as cases in which fines, penalties, and forfeitures had been incurred in the eastern district of Missouri, for alleged violations
4 of the internal revenue laws of the United States; whereupon this plaintiff inquired into and examined said cases, and upon such inquiry and examination he, as such district attorney, decided that proceedings therein could not probably be sustained, and that the ends of public justice did not require that such proceedings should be instituted, and he thereupon made report of the facts in such cases to the Commissioner of Internal Revenue for his direction; whereupon defendant became and was indebted unto plaintiff for his expenses incurred and services rendered in said cases in the sum of five dollars for each case, to wit, in the sum of two hundred and thirty-five dollars; that afterwards, to wit, on the 9th day of March, 1889, this plaintiff duly made out and submitted his claim for said services rendered in said cases in the said sum of two hundred and thirty-five dollars to the district judge of said eastern district of Missouri, and the same was duly allowed and certified by him, and afterwards, to wit, on the day of , 188 , this plaintiff duly presented said claim for payment to defendant in its Department of the Treasury, to the accounting officers of the Treasury, whereupon said defendant, by its said Department, wrongfully neglected and refused to pay the same.

Wherefore plaintiff prays judgment against the defendant upon the facts and the law, and for his costs of suit in this behalf expended.

And for another and further cause of action plaintiff states that his full name is Thomas P. Bashaw, and that he resides in the city of St. Louis, in the State of Missouri, and that at the time of the rendering of the services hereinafter mentioned he was the district attorney of the United States for the eastern district of Missouri, duly appointed, commissioned, and qualified.

Plaintiff further states that on the 31st day of August, 1888, charges were preferred against one Harry A. Schmidt, alleging that said Harry A. Schmidt had imported foreigners and aliens under contract to perform labor in the United States in twelve several instances, and thereupon this plaintiff examined into the law and facts of each case, and of each of said alleged offenses, and incurred charges and expenses, and rendered services in and about the investigation thereof, on behalf of defendant, and did, on the 31st day of August, 1888, file petitions in twelve several cases, numbered 2970, 2971, 2972, 2973, 2974, 2975, 2976, 2977, 2978, 2979, 2980,

and 2981, wherein the United States was plaintiff and said Harry A. Schmidt was defendant, returnable, respectively, to the September term of the circuit court of the United States, 1888, for the eastern district of Missouri, and did prosecute said cases in court; that, before said causes came on to be heard, plaintiff was removed from his said office of district attorney, pending an offer to compromise said causes made by defendant therein and entertained by the Secretary of the Treasury, and his further conduct of said cases thereby prevented. Plaintiff further states that after his said removal as district attorney said cases were further prosecuted by George D. Reynolds, esquire, the present district attorney, till the 19th day of April, 1890, when all further proceedings therein were discontinued and said causes were dismissed by reason of and on account of the action of the Secretary of the Treasury of the United States in compromising said causes of action, thereby preventing the recovery of a judgment therein, and thereby depriving plaintiff of the fees which he would otherwise have earned.

5 Plaintiff further states that his services rendered in and about the cases aforesaid were reasonably worth the sum of three hundred dollars.

Afterwards, to wit, on the day of , 188 , this plaintiff duly made out and submitted to the judge of the district court of the eastern district of Missouri an account for said services, a copy of which is hereto attached, marked Exhibit C, and made a part hereof, in the said sum of three hundred dollars, and obtained his certificate allowing the same, and afterwards, to wit, on the day of , 188 , this plaintiff presented said account to the accounting officers of the Treasury for payment, but defendant by its said officers wrongfully neglected and refused to pay the same.

Wherefore plaintiff prays judgment against the defendant upon the facts and the law, in the said sum of three hundred dollars, and for his costs of suit in this behalf expended.

And for another and further cause of action plaintiff states that his full name is Thomas P. Bashaw, and that he resides in the city of St. Louis, Missouri, and that at the time of rendering the services hereinafter mentioned he was the duly appointed, commissioned, and qualified attorney of the United States for the eastern district of Missouri.

Plaintiff further states that on the 25th day of November, 1887, the defendant, by its Comptroller of the Currency, instructed this plaintiff to institute an action for the forfeiture of the charter of the Fifth National Bank of St. Louis, Missouri, and thereupon this plaintiff, in compliance with said instructions, instituted proceedings in the case of William L. Trenholm against the Fifth National Bank of St. Louis, Missouri, in the circuit court for the United States for the eastern district of Missouri, returnable to the March term of said court, 1888, for the purpose of forfeiting the charter of said bank, and conducted and managed the prosecution thereof till the 21st day of May, 1888, when final judgment was rendered therein, forfeiting said charter. Whereupon defendant became and was indebted unto plaintiff in the sum of one thousand dollars.

And afterwards, to wit, on the day of , 188 , plaintiff made out and submitted his accounts for said services to the judge of the district court of the eastern district of Missouri in the said sum of one

thousand dollars, and the same was duly allowed by him and certified; and afterwards, to wit, on the day of , 188 , this plaintiff presented the said account to defendant in its Department of Justice, to the Attorney-General, for allowance and payment, but the defendant wrongfully, by its said Department, neglected and refused to pay the same.

Wherefore plaintiff prays judgment against the defendant in the said sum of one thousand dollars, upon the facts and the law, and for his cost of suit in this behalf expended.

STATE OF MISSOURI,
City of St. Louis, ss:

Thomas P. Bashaw, the above plaintiff, being duly sworn, upon his oath says that the facts stated in the foregoing amended petition are true.

THOMAS P. BASHAW.

Sworn to and subscribed before me this 13th day of April, 1891.

A. P. SELBY, *Clerk.*
By GEO. F. HAID, *Deputy.*

6 Said Exhibit A above referred to is in words and figures following, to wit:

EXHIBIT A.

The United States to Thomas P. Bashaw, Dr.

For services rendered as attorney of the United States for the eastern district of Missouri in the inquiry and examination into the law and facts involved in the following cases reported by the collector of internal revenue of the first collection district of Missouri, to said attorney during a term commencing the 28th day of January, 1887, and ending the 30th day of June, 1888, in which fines, penalties, and forfeitures were incurred in the eastern district of Missouri for alleged violations of the internal-revenue laws of the United States, in which said cases the said attorney decided upon such inquiry and examiuation that the ends of public justice did not require that proceedings for the enforcement of said fines, penalties, and forfeitures should be instituted, reported to Commissioner of Internal Revenue December 21, 1888:

Name.	Date of offense.	Offense.
1. J. H. Allen	May 1 to June 4, '88	D. M. T.
2. Brown Station Co op. A'n	Feb. 10 to Mar. 7, '88	"
3. W. L. Bittner	Feb. 25 to Mar. 9, '88	"
4. Byrd and Tooloose	March 17 to Apr. 5, '88	"
5. J. M. Boyd	June 1–8, '88	"
6. Giles Boland	May to June 7, '87	"
7. Brown Tobacco Co	June 10 to July 26, '87	D. L. T. H.
8. E. C. H. Bell	July 1 to Aug. 3, '87	D. M. T.
9. Berry and Gray	July 30 to Aug. 3, '87	"
10. W. P. Boone	July 22 to Aug. 26, '87	M'n'f'r tob.
11. Buschmann Bros	July 4 to Aug. 25, '87	D. M. T.
12. M. L. Barker	Aug. 20 to Sept. 21, '87	R. L. D.
13. Royal Bill	May 1 to Dec. 15, '87	"
14. Blades and Oberfeldt	Nov. 1 to Dec. 13, '87	D. M. T.
15. Herman Bronds	Oct. 20 to Nov. 5, '86	"
16. J. A. Curry	Dec. 10–11, '87	Refilling empty cigar box.
17. Jno. D. Crenshaw	Jan. 31 to Feb. 6, '88	D. M. T.
18. Commins and Bates	Jan. 30 to Feb. 8, '88	"
19. C. A. Croley	Jan. 24 to Feb. 20, '88	"
20. J. E. Coleman	May 1 to June 5, '88	"

	Name.	Date of offense.	Offense.
21.	Jno. Cooney	May 1 to June 2, '87	R. L. D. D. M. T
22.	Byron H. Cody	July 26 to Aug. 3, '87	D. M. T.
23.	Jno. H. Cunningham	July 28 to Aug. 5, '87	D. M. T.
24.	Chadwick and Ferguson	July 30 to Aug. 6, '87	"
25.	Christ and Cochrane	Aug. 31 to Sep. 6, '87	"
26.	Mrs. L. A. Cain	May 1 to Nov. 29, '87	"
27.	John Dutly	Jan. 1 to Feb. 7, '88	D. M. T. & R. L. D.
28.	Dixon and Griffith	Jan 31 to Feb 13, '88	D. M. T.
29.	W. F. Doekter	May 1 to July 26, '88	D. M. T. & R. L. D.
30.	De Lisle Bros. & Co	Dec., '87, to Jan'y, '88	D. M. T.
31.	T. V. Day	May 1 to June 2, '87	R. L. D. & D. M. T.
32.	Edgar Davis	Dec., '86, to Jan'y, '87	D. M. T.
33.	G. L. Gilbetton	May 1 to June 1, '88	"
34.	Edwards & orris	July 1 to Sep. 21, '87	"
35.	M. Fisher & Son	Feb. 21 to Mar. 17, '88	"
36.	Freudenstein Bros.	Nov. 1 to Dec. 9, '86	"
37.	Catherine Fischer	Nov., '86, to Feb., '87	"
38.	Mary L. A. Fischer	May 1 to June 22, '87	"
39.	Edwin Ferguson	July 29 to Aug. 4, '87	"
40.	John F. M. Farmer	July 25 to Aug. 4, '87	"
41.	The C. A. Ghio & Bros. W. L. Co	May, '87, to Jan., '88	Rectifier lqs.
42.	C. C. Gentry & Son	Feb. 29 to Mar. 9, '88	D. M. T.
43.	Mamie Guthrie	Apl. 1 to May 16, '88	"
44.	W. C. Green & Co	Feb. 29 to Mar. 9, 88	R. L. D. & D. M. T.
45.	Jos. Gray	Dec., '86, Jan., '87	D. M. T.
46.	Gens & Feide	Mar. 15 to Ap'l 14, '87	"
47.	Margaret Gahn	May 1 to June 2, '87	R. L. D. & D. M. T.
48.	Gr't Western Weiss Beer B. Co	May 1 to June 4, '87	W. M. L. D.
49.	Hy E Green	May 1 to June 11, '87	D. M. T.
50	Leo Gass	June 9 to July 9, '87	"
51.	George & Marshall	July 29 to Aug. 8, '87	"
52.	Garetson & Co	Feb. 14 to Mar. 3, '87	D. M. T.
	53. Hutchinson & Perkins	Mar. 20 to Apl. 6, '88	R. L. D. & D. M. T.
7	54. J. A. Hunter & Bro	Mar. 28 to Apl. 7, '88	D. M. T.
	55. Chas. Hudd eston	May 1 to June 15, '88	"
56.	Hannibal Tob. Co	May 1 to June 18, '88	M. T.
57.	Hiram N. Holliday	Dec., '86, Jan., '87	D. M. T.
58.	J. C. Howell	Nov. 28 to Dec. 7, '86	"
59.	Haffner & Froelich	May 1 to June 1, '87	"
60.	Virginia Hensley	May 1 to June 11, '87	"
61.	T. J. Hennessey	May 1 to June 11, '87	"
62.	Jno. R. Harrison	May 1 to June 17, '87	"
63.	S. H. Hill	June 6 to July 6, '87	"
64.	A. Hawkins	June 6 to July 6, '87	"
65.	Haberman & Soldan	May 1 to July 25, '87	Rectifier lqs.
66.	George Hartman	May 1 to May 18, '87	Manfr. cigars.
67.	Hulen, Hulett & Co	Nov. 1 to Dec. 9, '87	D. M. T.
68.	J. A. Hughey	Dec., '86, Jan., '87	R. L. D.
69.	Emma Jaeger	Mar. 29 to Apl. 5, '88	D. M. T.
70.	J. L. Jones	May 26 to June 6, '87	"
71.	Journeay & Bauman	Sep 29 to Oct. 1, '87	R. L. D. & D. M. T.
72.	Jackson & Holmes	Nov. 25 to Dec. 5, '87	D. M. T.
73.	Otto Kohrs	Dec., '87, Jan., '88	"
74.	Keen & Collins	Feb. 24 to Mar. 26, '88	"
75.	Kott & Ritter	May 25 to June 8, '88	R. L. D. & D. M. T.
76.	Mrs. A. B. Klink	May 1 to June 2, '88	D. M. T.
77	Margaretha Kumpf	May 1 to June 5, '88	"
78	George King	Apl. 20 to May 16, '87	R. L. D. & D. M. T.
79	Mary Kramer	May 1 to June 2, '87	D. M. T.
80.	Henry Knesr	May 1 to June 20, '87	R. L. D. & D. M. T.
81.	Thomas Kelly	July 23 to Aug. 3, '87	" "
82.	W. F. Kirkwood	Sep. 12 to Oct. 10, '87	D. M. T.
83.	F. Kippenberg	May 1, '82, Mar. 21, '87	R. D. M. L.
84.	R. E. Lagrone	Jan. 3 to Feb. 1, '87	D. M. T.
85.	B. F. Luckett	July 30 to Aug. 9, '87	"
86.	Thomas Lord	Aug. 30 to Sep. 7, '87	"
87.	Loide and Bro	Sep. 15 to Nov. 15, '87	"
88.	K. A. Laird	Nov. 7 to Dec. 12, '87	"
89.	Peter Meyers	Jannary 1, 1888	R. L. D.
90.	D. E. Morris	Jan. 19 to Feb. 9, '88	D. M. T.
91.	Margaret McKibben	Feb 6 to Mar. 7, '88	"
92.	Marshall & Pamplin	Jan. 17 to Apl. 18, '88	R. D. Oleo.
93.	R N & J. L. McFarland	May 31 to June 6, '88	D. M. T.
94.	E. Mayes	May 1 to June 14, '88	"
95.	Mrs. L. F. Medley	May 1 to Aug. 3, '88	"
96.	Meyer Bros. & Co	Apl. 1 to May 26, '87	Rect.—Lqs.
97.	Wolf G. Meyer	May 1 to June 1, '87	D. M. T.
98.	Jno Molloy	May 1 to June 14, '87	"
99.	H. L. C. Meyers	May 1 to June 22, '87	"
100	Gus Martin	June 23 to July 8, '87	"
101.	A. Muse	June 28 to July 7, '87	D. M. T.
102.	Geo. P. Mulhall	July 7 to Aug. 5, '87	R. L. D. & D. M. T.
103.	Mo. Lumber & Mining Co	July 20 to Aug. 31, '87	D. M. T.
104.	L. Margreiter	Sep. 30 to Oct. 17, '87	"

	Name.	Date of offense.	Offense.
105.	Mellier Drug Co	Janu 15 to Mar. 10, '87	W. L. D.
106.	Jno. McEachirn	May 1 to June 22, '87	R. L. D. & D. M. T.
107.	F. M. North	May 1 to Feb. 1, '88	D. M. T.
108.	Chas. Nitzen	July 21 to Aug. 1, '87	"
109.	Ellen Nolan	May 1 to Sep. 24, '87	R. L. D. & D. M. T.
110.	Newton & Childers	Oct. 14 to Nov. 16, '87	D. M. T.
111.	Jno. S Nowack	Nov. 12 to Dec. 30, '87	R. L. D. & D. M. T.
112.	Ordelheide & Stracke	Jan. 28 to Feb. 24, '88	D. M. T.
113.	Mrs. Jno. O'Neill	Jan. 1 to Mar. 17, '88	R. L. D. & D. M. T.
114.	Kate O'Laughlin	May 1 to June 4, '88	D. M. T.
115.	A. Pabst	January 1, '88	R. L. D.
116.	Sam'l M Porter	Mar. 31 to Apl. 2, '87	D. M. T.
117.	Price & Lucky	Mar. 21 to Apl. 9, '87	"
118.	S. S. Patton	July 1 to Aug. 5, '87	"
119	F. M. Purcell	May 1, '86, Sep. 15, '87	R. L. D.
120.	J. M. Proctor & Co	May 1 to Sep. 20, '87	D. M. T.
121.	E. C. Patrick	Nov. 23 to Dec. 12, '87	"
122.	Piper, Drury & Co	Nov. 21 to Dec. 13, 87	"
123	" " "	" " "	"
124.	David C. Pollock	Jan. 1 to Feb. 10, '87	R. L. D.
125.	J. C. Raible	Mar. 29 to Apl. 14, '88	R. D. Oleo.
126.	Richmond & Uht	Mar. 23 to Apl. 21, '88	D. M. T.
127.	Christ Rollin	May 1 to June 1, '88	R. L. D. & D. M. T.
128.	Robertson & Smith	May 1 to June 6, '88	D. M. T.
129.	C. S. Rannells	May 1 to June 15, '87	"
130.	T. B. Ragland	July 30 to Aug. 6, '87	D. M. T.
131.	Peter J. Reid	Aug. 31 to Sep. 6, '87	"
132.	C. M. Robertson	Aug. 22 to Sep. 7, '87	R. L. D. & D. M. T.
133.	Hermann Rennekamp	October 7, 1887	Oleo.
134.	W. P. Rule	Nov. 17 to Dec. 13, '87	D. M. T.
135.	Geo. Schachner & Son	Dec., '87, Jan., '88	R. L. D. & D. M. T.
136.	Seitz Merchandise Co	May 1, '87, Apl. 1, '88	W. M. L. D.
137.	Scheel & Crusins	Mar. 16 to Apl. 4, '88	R. L. D. & D. M. T.
8 138.	L. M. Smith	Mar. 5 to Apl. 5, '88	D. M. T.
139.	S. St. Louis Gymnastic Sy	May 1 to Mar. 21, '87	R. L. D. & D. M. T.
140.	J. H. Stuessel	June, '86, Apl., '87	R. L. D.
141.	Mrs. M. Scherer	Mch. 17 to Apl. 7, '87	D. M. T.
142.	William Schneider	May 1 to June 1, '87	R. L. D. & D. M. T.
143.	Henry S'Renco	May 1 to June 2, '87	Cigar manfr.
144.	Stephens & Smith	Aug. 13 to Sep. 6, '87	D. M. T.
145.	Thorn & Andrews	Jan. 11 to Feb. 15, '88	"
146.	Vincent Treaux	May 30 to June 15, '87	"
147.	Wm. P. Tuttle	Nov. 28 to Dec. 8, '87	"
148.	Fritz Utz	Sep. 28 to Oct. 3, '87	R. L. D. & D. M. T.
149.	W. Frank Van Dyke	Dec., '87, Jan., '88	D. M. T.
150.	Elizabeth Volmar	May 1 to Feb. 3, '87	"
151.	Henry G. Vasel	May 1 to June 1, '87	R. L. D. & D. M. T.
152.	Henry C. Withers	Jan. 31 to Feb. 4, '88	D. M. T.
153.	August Wesseling	Feb. 1 to Apl. 30, '88	"
154.	Henry W. Wulze	May 1 to June 1, '88	R. L. D. & D. M. T.
155.	Mary Welge	May 1 to June 12, '88	D. M. T.
156.	Wood Bros	Mar. 20 to Apl. 7, '87	"
157.	Mrs. Christ Weber	May 1 to June 2, '87	R. L. D. & D. M. T.
158.	Dan'l E. Whelan	May 1 to June 2, '87	R. L. D. & D. M. T.
159.	R. C. Wettig	May 1 to June 1, '87	D. M. T.
160.	J. P. Walden	May 1 to June 3, '87	"
161.	Robert H. West	June 27 to July 9, '87	"
162.	E. L. Williams	June 27 to July 11, '87	"
163.	Mrs. Sophia Wiedensohler	Jan. 28 to Feb. 4, '87	R. L. D. & D. M. T.
164.	W. T. How	Feb. 20 to Mar. 2, '87	D. M. T.
165.	Alex. Prior	Jan. 1 to Feb. 25, '88	D. L. T.

Total, 165 cases, at $5.00 each, $825.00.

Said Exhibit "B" above referred to is in words and figures following, to wit:

EXHIBIT "B."

The United States, to Thomas P. Bashaw, Dr.

For services rendered as attorney of the United States for the eastern district of Missouri, in the inquiry and examination into the law and facts involved in the following cases reported by the collector of internal

revenue of the first collection district of Missouri, to said attorney during a term commencing on the 1st day of July, 1888, and ending on the 31st day of December, 1888, in which fines, penalties, and forfeitures were incurred in the eastern district of Missouri, for alleged violations of the internal-revenue laws of the United States, in which said cases the said attorney decided, upon such inquiry and examination, that the ends of public justice did not require that proceedings for the enforcement of said fines, penalties, and forfeitures should be instituted: reported to Commissioner of Internal Revenue, February 1, 1889.

Name.	Offense.	Date.
W. A. Anthony	D. M. T	Oct. 1 to Nov. 28, '88.
T. G. Barnhill	"	July 1 to Aug. 9, '88.
J. B. Boone	R. L. D. & D. M. T.	May 1 to July 23, '88.
Burker and Jaeger	D. M. T	Nov. 1 to Dec. 10, '88.
L. Curtis	R. L. D.	Nov. 20 to Dec. 13, '88.
Cole and Williams	D. M. T	Oct. 10 to Dec. 13, '88.
Dwyer and Bray	R. L. D. & D. M. T	May 1 to July 2, 8'8.
John Donahue	" "	Sep. 28 to Oct. 2, '88.
H. H. & L. Daugherty	R. L. D.	May 1 to June 10, '88.
C. A. Daust & Co	D. M. T	Nov. 1 to Dec. 12, '88.
Green Fasley	"	Nov. 9 to Dec. 5, '87.
Chas. Edwards	"	Nov. 1 to Dec. 1, '88.
Flynn and Walsh	R. L. D. & D. M. T	Aug. 1 to Sep. 15, '88.
L. B. & M. O. Frayser	D. M. T	Sep. 20 to Oct. 11, '88.
Josephine Goldschmidt	"	May 1 to June 22, '88.
9 J. O. Gisborn	D. M. T	Aug. 30 to Sep. 6, '87.
John T. Gilldan	"	Oct. 24 to Nov. 22, '88.
May Gardner	R. L. D.	Dec. 15, '86. to Jan. 7, '87.
C. T. Holbrock	D. M. T	Nov. 1 to Dec. 2, '86.
Happe and Bower	R. L. D. & D. M. T.	Nov. 23 to Dec. 7, '87.
M. M. Jodd	" "	May 1 to June 26, '88.
Kalb Drug Co	R. L. D.	May 1 to July 3, '88.
Mrs. Minnie Kirsch	D. M. T	May 1 to July 24, '88.
Jno. W. Luster	D. M. T	Sep. 26 to Oct. 10, '88.
S. G. A. Medley	"	Dec. 15, '87 to Jan. 6, '88.
Mrs. M. Maguire	"	May 1 to July 23, '88.
Andrew Murphy	R. L. D. & D. M. T	Sep. 1 to Nov. 3, '88.
Chittick Mortland	D. M. T	Sep. 28 to Oct. 24, '88.
C. A. McDonald	D. M. T	Sep. 22 to Oct. 7, '87.
McSpadden and Headlee	"	Sep. 29 to Oct. 9, '88.
Theo. G. McCune	"	Nov. 29 to Dec. 23, '88.
John Prior	R. L. D. & D. M. T.	Sep. 29 to Oct. 1, '88.
Mary Ryan	D. M. T	May 1 to July 7, '88.
Johanna Rau	"	May 1 to June 27, '88.
Henry Roemer	"	July 16 to Aug. 3, '88.
T. H. Ryan	"	May 1 to July 31, '88.
Scharff Bros	W. L. D. & D. M. T.	May 1 to July 5, '88.
Strother and Clayton	D. M. T	May 30 to June 8, '88.
Smith and Lingenfelter	"	June 29 to July 9, '88.
C. G. Stifel Brewing Co	W. M. L. D	May 1 to Aug. 25, '88.
J. M. Shore	D. M. T	Aug. 1 to Sep. 12, '88.
Nicholas Stern	Manf. cigars	Nov. 1 to Aug. 22, '88.
John Taylor, jr	D. M. T	Nov. 1 to Dec. 1. '86.
D. G. Tutt Grocery Co	W. D. M. L	May 1 to Nov. 7, '87.
C. P. Wilson	R. L. D	Aug. 1 to Sep. 22, '88.
Kate Wetzel	R. L. D. & D. M. T.	July 29 to Aug. 16, '88.
A. F. Wellmeyer	D. M. T	Aug. 21 to Sep. 26, '88.

Total 47 cases, at $5.00 each, $235.00.

Said Exhibit C, above referred to, is in words and figures following, to wit:

EXHIBIT C.

The United States in account with Thomas P. Bashaw, Dr.

To professional services performed for the United States while and as United States district attorney for the eastern district of Missouri in the

United States circuit court for the eastern division of said district, at St. Louis, on divers days, between the 1st day of July, 1888, until the 27th day of May, 1889, in twelve several cases in which the United States was plaintiff and Harry A. Schmidt was defendant, being causes numbered 2970 and 2981, both included, on the docket of said court, said services consisting of an examination of the law and the facts, conferences with the parties preferring the charges, correspondence with the United States consul at Hamburg, Germany, interviews with and particular examination of the persons imported, and of the correspondence had between them and the defendant, preparing, drawing, and filing the declaration in each of said causes and the collection of the evidence and preparation for trial, and looking after the cases in court, at $25 in each case, $300.

Said Exhibit D, above referred to, is in words and figures following, to wit:

EXHIBIT D.

The United States in account with Thomas P. Bashaw, Dr.

To services rendered at the direction of the Attorney-General as attorney for the United States in the case of Wm. H. Bliss against the
10 United States, in the United States circuit court for the eastern district of Missouri, declaration in debt during the years 1887, 1888, and 1889; said services consisting of examination of law and facts, preparing, filing, arguing and submitting plea to the jurisdiction, preparing and filing answer to the amended petition; preparing and filing agreed statement of facts; arguing and submitting case, and consultations with plaintiff and plaintiff's attorneys; damages assessed for plaintiff at $2,500; and for defendant on set-off at $2,429$\frac{11}{100}$, and judgment for plaintiff for 70\frac{89}{100}$; arguing and submitting motion for new trial, $500.00.

The following are the docket entries in the case: Wm. H. Bliss vs. The United States, docket No. 2888: Petition filed August 8, 1887; plea to jurisdiction filed October 8, 1887; amended petition filed March 3, 1888; plea to jurisdiction submitted, with leave to plaintiff and defendant to file briefs March 19, 1888; plea to jurisdiction overruled April 13, 1888; answer to amended petition filed May 7, 1888; Cochran, Dickson and Smith enter their appearance as attorneys for plaintiff September 20, 1888; replication of plaintiff filed November 27, 1888; agreed statement of facts filed November 27, 1888; argued and submitted December 17, 1888; damages assessed for plaintiff on his cause of action at $2,500.00, and for defendant on set-off at $2,429 and $\frac{11}{100}$ and judgment for plaintiff for 70\frac{89}{100}$ January 2, 1889; motion for a new trial filed by plaintiff January 5, 1889; motion for new trial argued and submitted January 30, 1889; judgment of January 2nd, 1889, set aside and ordered that cause stand submitted on evidence adduced in order that certain questions of law involved might be determined by a full bench, March 5th, 1889; cause argued and submitted before a full bench March 25, 1889; damages assessed for plaintiff on his cause of action at $2,500.00, and for defendant on set-off at $2,429$\frac{11}{100}$, and judgment for plaintiff for 70\frac{89}{100}$ March 27th, 1889.

UNITED STATES OF AMERICA,
Eastern division of the Eastern Judicial District of Missouri, ss:

Thomas P. Bashaw, United States attorney for the eastern district of Missouri, being duly sworn, on his oath deposes and says that the services charged for in the above account have been actually and necessarily performed, as therein stated.

THOMAS B. BASHAW.
United States Attorney for the Eastern District of Missouri.

Subscribed and sworn to before me this 3d day of April, 1889.
[SEAL.] A. P. SELBY, *Clerk.*

I certify that the charges made by the district attorney for the services rendered in this case is, in my opinion, reasonable.

AMOS M. THAYER,
District Judge.

11 And afterwards, to wit, on the seventeenth day of April, A. D. 1891, there was filed in said cause an answer to amended petition, in words and figures following, to wit:

Answer to amended petition.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss:

In the circuit court of the United States for the eastern division of the eastern judicial district of Missouri. March term, 1891.

THOMAS P. BASHAW, PLAINTIFF,
vs.
THE UNITED STATES, DEFENDANT. } Answer to amended petition.

Defendant, by Geo. D. Reynolds, its attorney, for answer to the first count of the amended petition of plaintiff herein, admits that plaintiff rendered the services for defendant as stated therein.

Defendant, for further answer to said first count, says, that by the statutes of the United States the plaintiff was entitled to a fee of ten dollars for said services, and no greater sum therefor, and that defendant has paid to plaintiff said sum of ten dollars for said services. Wherefore, as to said count or cause of action, it prays to be discharged with its costs.

And defendant, for answer to the second count of the said amended petition of plaintiff herein, denies each and every allegation therein contained.

And defendant, for answer to the third count of the said amended petition of plaintiff herein, denies each and every allegation therein contained

And defendant, for answer to the fourth count of the said amended petition of plaintiff herein, denies each and every allegation therein contained.

And for answer to the fifth count in the amended petition of plaintiff herein, defendant, by said attorney, admits that plaintiff rendered the services as stated therein.

Defendant, for further answer to said fifth count in plaintiff's amended petition, says, that by the statutes of the United States the plaintiff was

entitled to a fee of ten dollars for said services, and no greater sum therefor, and that defendant has paid to the plaintiff said sum of ten dollars for said services; wherefore, as to said fifth count or cause of action, it prays to be discharged with its costs.

And, further answering, defendant says that for each of the years and parts of years included in the said amended petition the plaintiff received from the United States the maximum compensation authorized by law for his services as United States attorney, and that he is not entitled to receive any compensation from the United States for said years or any parts thereof included in said amended petition, and during which the said services were rendered over and above the amount already paid him by the United States.

GEO. D. REYNOLDS,
United States Attorney, Eastern District of Missouri.

12 And afterwards, to wit, on the eighth day of May, A. D. 1891, there was filed in said cause a reply, in words and figures following, to wit:

Reply.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss:

In the United States circuit court in and for said division of said district.

THOMAS P. BASHAW, PLAINTIFF,
vs.
THE UNITED STATES, DEFENDANT. } No. 3503. Reply.

Now comes plaintiff and, for reply to defendant's answer to the first count in plaintiff's petition, denies each and every allegation of new matter in said answer to said first count contained.

And plaintiff, for reply to defendant's answer to the fifth count in plaintiff's petition, denies each and every allegation of new matter in said answer to said fifth count contained.

KNAPP & HARRIS,
Attorneys for Plaintiff.

And also on said eighth day of May, A. D. 1891, there was filed in said cause a certain stipulation, in words and figures following, to wit:

Stipulation.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss:

In the United States circuit court in and for said division of said district.

THOMAS P. BASHAW, PLAINTIFF,
vs.
THE UNITED STATES, DEFENDANT. } No. 3503. Stipulation.

It is hereby stipulated and agreed by and between the parties in the above cause, through their attorneys, that in the event judgment is rendered for

plaintiff on any count of plaintiff's petition, and that by reason of said judgment the amount which plaintiff is entitled to receive from the defendant that should be reported to the Attorney-General, upon the semiannual emolument returns of district attorneys, should be and become in excess of the amount which district attorneys are permitted to retain out of the fees of their office by law, then any excess may be retained by defendant and plaintiff will not be entitled to receive said excess.

GEO. D. REYLOLDS,
U. S. Atty.
KNAPP & HARRIS,
Attys. for Plaintiff.

13 UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss:

In the circuit court of the United States, in and for said division and district.

THOMAS P. BASHAW, PLAINTIFF,
vs.
THE UNITED STATES, DEFENDANT. } No. 3503.

Now on this 11th day of May, A. D. 1891, this cause coming on to be heard on the law and the evidence, come Thomas P. Bashaw, plaintiff herein, by Knapp & Harris, his attorneys, and the United States, defendant, represented by Geo. D. Reynolds, esq., district attorney for said district, and E. P. Johnson, esq., assistant district attorney, and the following testimony and evidence were given:

Mr. REYNOLDS. Your honor, Mr. Johnson will represent the Government in this case. I have a stenographer here, so that your honor will not need to make any notes unless you want.

Mr. KNAPP. In this case I believe your honor has passed on all the counts except the one in regard to the Schmidt cases.

The COURT. How is that?

Mr. KNAPP. I was going to read it to your honor. (He reads the count in the petition in which the plaintiff claims fees in twelve cases of the United States vs. H. A. Schmidt.) The other counts are the same as in the original petition. I believe your honor is familiar with them.

Mr. JOHNSON. I will read the answer to your honor. It is very short. (Mr. Johnson reads the answer to the amended petition.)

The COURT. What is the first count about?

Mr. KNAPP. It is the charge for services in the case of William H. Bliss vs. the United States, under the act of March 30th, 1887.

Mr. JOHNSON (after reading the answer). Now, your honor, we had a further allegation in the answer, which is as follows, but which we propose now to dismiss and to file a spitulation in place of it. I will just read it (he reads the portion referred to). Now, we dismiss that clause of our answer, and in lieu of it file the following stipulation (he reads the stipulation). So that we obviate the ———. It is already filed. Now, your honor, as a matter of form I wish to make an objection to receiving any evidence on any one of these counts, for the reason that each one of these counts fails to state any cause of action, and shows on the face of it

that plaintiff is not entitled to recover. However, your honor has passed on all the accounts except that of the Schmidt cases. In that I think the objection is well taken. It does not state any cause of action, it simply says that plaintiff was removed and has not received any fee. On the same argument he would be entitled to fees in all cases pending then.

Mr. KNAPP. In reply to the answer to the first count plaintiff files this (he reads the replication to the first count and to the fifth count). Those counts being for services in the Bliss case and services in the matter of the forfeiture of the charter of the Fifth National Bank.

14 THOMAS P. BASHAW, the plaintiff, being sworn, testified in his own behalf as follows:

Examined by THOMAS M. KNAPP, Esq.:

Q. What is your name?

A. Thomas P. Bashaw.

Q. Where do you reside?

A. St. Louis, Missouri.

Q. Were you district attorney of the United States?

A. Yes, sir; of the eastern district of Missouri.

Q. When were you appointed?

A. I was appointed sometime in January, 1887. I qualified on the 28th of January.

Q. How long did you remain as district attorney?

A. Until the 28th of May, 1889, I think.

Q. In August, 1887, you were district attorney?

A. Yes, sir.

Q. Was there a suit filed by William H. Bliss against the United States for services?

A. Yes, sir; there was.

Q. He had been district attorney before that?

A. Yes, sir.

Q. Did you appear in that suit as the attorney of the United States?

A. I did.

Q. Conducted the management of that case?

A. I did in connection with my assistants, and gave it a good deal of personal attention.

Q. Was that disposed of in March, 1889, or about that time?

A. I think it was that time, about.

Q. Did you present any account for services to the judge of the district court, judge?

A. Well, I made out an account against the Government and asked the court to certify to it that the fee charged was reasonable as to amount.

Q. You presented that account to the Department of Justice, the defendant?

A. Yes, sir.

Q. Was that ever paid?

A. No, sir.

Q. How much was allowed, or rather how much did you claim in that account?

A. I think it was $500.00; I have forgotten whether it was $500.00 or $600.00.

The COURT. You have the bill.

Mr. KNAPP. It was $500.00.

Q. Were the services in that case worth the sum of $500.00?

(Objected to on the theory that the law fixes the compensation in such cases.)

The COURT. I will have to determine both the law and the facts.

Mr. JOHNSON. I did that as a matter of form.

(Objection overruled.)

A. I think they were really worth $500.00 It was a case of some importance. The examination of the case rendered necessary the
15 examination of the records of the circuit court, and as I now remember a trip to Washington City, and examining the records there, to make preparations for the defense. I was directed by the Department of Justice to give that case special attention, as I now remember, and to keep the Department informed of every step I took in the case, and I did give it special attention, I and both of my assistants.

Q. Ever been paid anything for that?

A. I think not.

Q. You presented your account to the defendant?

A. Yes, sir; I sent it on, and when in Washington I had several talks with the officer of the Department of Justice who has charge of matters of that kind. The value of the services were never questioned. It was the reasonableness of the fee.

Q. Did you ever, between January, 1887, and July, 1888, when the collector reported to you, as district attorney, divers and sundry cases, ever examine those reports of cases in which fines, penalties, and forfeitures had been incurred?

A. Yes, sir; those were cases reported by the collector of internal revenue.

Q. Did you inquire into and examine those reports?

A. Yes, sir; they were reported by the collector of internal revenue, and under the statute I was required to examine into them, and I did so.

Q. State, as a general rule, in what way those examinations were conducted.

A. Well, it depended to some extent on the place of residence of the party charged. If he lived in this city we had a . Well, we had a circular letter we sent to the party whether he lived in or out of the city. But if he lived in the city he usually reported to the office, and we inquired into the facts by a personal examination, by asking the party questions and reporting the facts as he claimed them to be, and afterwards, if we deemed it necessary, by making inquiry as to the standing of the party, what kind of business he was in, what the probabilities were as to whether it was a mere oversight or inadvertency, or whether it was with any intention to evade or violate the law; in other words, to ascertain what the real facts were, and what was the degree of culpability in the defendant. If he lived outside of the city it was ascertained by correspondence. I kept a record of those proceedings.

Q. Those were cases in which you decided that proceedings could not properly be sustained, and that the ends of public justice did not require that they should be instituted, and therefore you reported them to the Commissioner of Internal Revenue not to be prosecuted?

A. Yes, sir; I reported all those cases to the Commissioner of Internal Revenue.

Q. What were your services worth in each one of these cases on an average?

A. Well, in some of them the services were worth a good deal of money. In some of them it was necessary to spend money, and always to do more or less work. I made that account at first out at $10.00. I thought that
16 was a reasonable fee, because I understood the Government has paid that in that class of cases. I afterwards found out it was only $5.00, so I made out an account at that rate. In some of the cases it was easy. The man would come down, and from conversation we could see there was no intentional violation; and again other circumstances prevented him, sometimes being a physical impossibility for him to have paid in time. I presented the account and payment was refused on the ground that the Government was not responsible unless cases were instituted under that section.

Mr. KNAPP (to Mr Johnson). You consent that the testimony now given with reference to the second count shall apply to the third?

Mr. JOHNSON. Oh, yes.

WITNESS. The facts with reference to the third count are the same. The cases were reported at different times from those in the second count. That is the only difference.

Q. On the first of , 1888, were charges preferred against Harry A. Schmidt?

A. Yes, sir.

Mr. JOHNSON. Now, your honor, we shall make the additional objection that if there was any fee fixed in that case at all the statute fixed it.

The COURT. I will hear the testimony, subject to your objection.

A. Yes, sir. Charges were made, I think, by some organization in this city, by the Tailors' Union, I think. I examined those and incurred charges and expenses with regard to them.

Q. State in a general way what those services were.

A. Well, the charge, as I now remember it, was that Mr. Schmidt, through an agent of his in Hamburg, had made a contract with some parties to work for him as merchant tailor at certain prices. I had a number of conferences with the parties making the charge and with the parties who were claimed to be brought here by Schmidt under his contract. I also had correspondence with the United States consul at Hamburg, and through him I ascertained what the facts would be from the testimony of this agent of Schmidt at Hamburg. I had conferences here with these imported men. They were all recently from Germany, and I do not think there was one with whom I could hold any sort of conversation without the aid of an interpreter, and after ascertaining what the facts were, and believing there was a good case against Schmidt, I instituted several actions, as it appeared to be my duty. And then these men had been discharged by Mr. Schmidt, and they had been scattered all over the United States. A few were still here. I, at one time, I think, had them all here and ready for trial. In the mean time Mr. Schmidt, through his attorneys, had submitted an offer of compromise, and it was being entertained by the Secretary of the Treasury, and the cases were laid over pending that in-

vestigation, and went over from time to time until I was removed from office. The cases, however, as I now remember, were at one time ready for trial as far as the Government was concerned.

Q. You were ready to try the cases when they were called?

A. They were never called for trial, because they knew this proposition was being entertained, and as a matter of fact they were never called for trial.

Q. What were your services in these cases worth?

A. Well, I made out the account for $300.00, $25.00 in each case. I think that is a reasonable fee. It was not questioned by the De-
17 partment. It was, as far as this country is concerned, a new law. I had no precedents to go by. As far as I could ascertain there was only one case filed like that then, and that was a proceeding against a church in the East for importing a minister. I prepared that case with care and it took considerable labor and trouble to do it.

Q. You presented your account in that amount?

A. Yes, sir.

Q. Was it ever paid?

A. No, sir.

Q. Ever receive anything for your services?

A. No, sir.

Q. Did you in November, 1888, by direction of the Comptroller of the Currency, bring an action or institute an action for the forfeiture of the charter of the Fifth National Bank of Missouri?

A. Yes, sir.

Q. What was the style of the case?

A. William N. Trenholm vs. The Fifth National Bank.

Q. Did you prosecute that until the 21st of May, until final judgment was rendered therein?

A. Yes, sir.

Q. What were your services reasonably worth?

A. I think they are worth what is claimed in the account submitted to the Department. I sent that account, and no objection was made against that account, so far as I know.

(Objected to on the ground that the statute fixes the fee.)

The COURT. I will hear the evidence subject to your objection.

Q. Ever have any correspondence with regard to it?

A. Yes, sir; a good deal of correspondence in regard to it.

The COURT. I do not think that that correspondence is admissible. The statements of these officers would not be binding on the Government.

Q. Did you ever receive any part of that?

A. No, sir.

The COURT. Did they ever make any allowance for services in that case?

A. No, sir; I can not answer that, if your honor please, without referring to those communications.

Mr. JOHNSON. I have no objection to the judge referring to the papers to refresh his memory.

A. My understanding that it was allowed and that the only trouble that was in the way was an appropriation. I never received a cent on this account.

Mr. JOHNSON. Did you ever receive any that was allowed?

A. I never received a cent. The question asked by his honor was whether the account was allowed.

The COURT. That was the point they made, that there was no appropriation to pay it?

A. Yes, sir; they informed me in person, when I was in Washington City, that it had been forwarded to Congress for an appropriation. It was sent to the Senate, because the bill had passed the House; that it did not get to the Senate in time; and they wrote a letter to the same effect to
18 Senator Cockrell, who I had asked to look after it for me. I consider that it was allowed, although they never told me in so many words that it had been. The statement was, that it had been sent over to Congress for an appropriation.

The COURT. That is, they had referred it to Congress for appropriation?

Mr. KNAPP. It was approved by the Attorney-General; yes, sir.

Cross-examination by E. P. JOHNSON:

Q. There was no formal allowance by the Department, but it was referred to Congress?

A. Mr. Johnson, you have the letter there of the Attorney-General to Senator Cockrell, which is almost word for word the statement made to me by the officer of the Department of Justice who has in charge that account, that it had been sent to the Senate for an appropriation, as I stated a while ago. The officer did not say to me, in so many words, that the account had been allowed. He made no statement about allowance. I understood from what he said, as I did from that letter, that it had been, although he does not say so in so many words.

Q. You had no notice that any had been made?

A. Not unless you consider that one.

Q. I do not consider that an allowance of itself.

A. Then I have not, because this statement made by this gentleman, that attorney, Mr. Hodges, was to the same effect as the statements contained in that letter.

Q. And you have no knowledge of its allowance having been made in any Department?

A. No, sir.

Q. This reference to Congress is——

A. I do not understand that to be a reference to Congress for its action. I do not think a Department has a right to do that. They have no right to send me to Congress as a petitioner for Congressional relief without my knowledge and consent. In other words, the Department undertook to ask Congress to pay me for services where they had not allowed any themselves.

Q. You have since had other correspondence with other Departments, have you not?

A. Yes, sir.

Q. In which the Department claimed that it was part of the regular services of the attorney to be performed by him under the fee bill?

A. Yes, sir. Well, not under the fee bill; no, sir.

Q. I will just ask you if there is not a letter that you received from the Attorney-General in regard to that?

Mr. KNAPP. Your honor, I think that the other letters should also be put in.

The COURT. Put them all in.

Q. One is a copy of the authority of your employment?

A. That is a letter from the Attorney-General in which he claims that it can not be paid by the Department because it is out of his control. There is also another letter from another Department stating that they can not pay it, because the Department of Justice before that had allowed and entertained them and paid them in other cases.

19 Q. Did you not receive another letter, Mr. Bashaw, in which the Attorney-General claimed that your services in this case, if for the Government, were just the same as in other cases for the Government, under the fee bill?

A. I do not remember that.

Mr. KNAPP. You refer to the Bliss case.

Mr. JOHNSON. Your honor, I think I have some other papers—letters in which I think this question is gone over.

WITNESS. I may have received the letter, but I do not recollect it. I am very certain that the disposition of the Department with reference to this claim certainly is not consistent throughout. I may have received a letter of the kind you refer to, but I do not recollect it. My recollection is that the final position of the Department was that it was a matter that came within the jurisdiction and duties of the Comptroller of the Currency, that it was service rendered on his order; that the Attorney-General could not pay it; that certain appropriations were made for the Comptroller for expenses incurred by him, but that these services were clearly not of this character, and could not be paid out of this fund. The position of the Comptroller of the Currency was that my account ought to be sent to the Attorney-General; that the Department of Justice in other cases of that kind had paid those as he understood.

Q. You do not remember a letter in which it was claimed that if you did these services that they came under the regular fee bill, or if they did not come under the regular fee bill that Mr. Stephens ought to pay you?

A. No, sir; I am satisfied I never received any such letter.

Q. Now you had a claim against Mr. Stephens, in which you had some correspondence with the Department about, didn't you?

A. But not with reference to this case.

Q. And you compromised with Mr. Stephens through the suggestion of the Department, didn't you, and made a receipt to Mr. Stephens?

A. I did, for services rendered by me to Mr. Stephens, but this was not in it. I did not render these services to Mr. Stephens. I had the same controversy with Mr. Stephens as my successor had with reference to the right to represent the receiver of the Fifth National Bank in all its litigation and business, and I did render some services for Mr. Stephens as the receiver of the Fifth National Bank, for which he paid me.

Q. You did claim $2,000.00 and compromised for $600.00?

A. I do not remember ever claiming that. I asked one of my assistants to see Mr. Stephens. I never made any claim against him. He saw me one day and said we had better fix the matter up, as he was willing to pay me up and asked me what I thought would be a reasonable sum. We talked the matter over and finally agreed on $600.00 for services rendered by me to him as receiver of the Fifth National Bank.

Mr. KNAPP. This was not included, was it?

A. No, sir. I did confer with Mr. Stephens about this account and as to where it ought to be paid, and so on, but did not claim against Mr. Stephens for this.

Mr. JOHNSON. I will say to your honor, that I supposed the judge had the original of this correspondence, and that I will hand in the
20 copies of them, if my memory is not at fault about what they are. If there is not any, of course I will not have any to send.

Plaintiff introduced the following letters in evidence:

Copy of a letter from the Acting Solicitor of the Treasury to Thomas P. Bashaw, of date November 25th, 1887.

Letter from F. M. Cockrell to Thomas P. Bashaw, of date March 30, 1889.

Letter from the Attorney-General to F. M. Cockrell, of date March 29, 1889.

Letter from the Deputy Comptroller of the Currency to F. M. Cockrell, of date March 25th, 1889.

Letter from the Attorney-General to Thomas P. Bashaw, of date October 21st, 1890.

The defendant introduced the following letters:

Letter from J. H. Maynard, Asst. Secretary of Treasury, to Thomas P. Bashaw, of date March 13th, 1890.

Letter from J. H. Maynard, Asst. Secretary of Treasury, to Thomas P. Bashaw, of date March 18th, 1890.

Letter from W. Windom, Secretary of Treasury, to W. W. Dudley, of date May 22nd, 1890.

Letter from Lon V. Stephens, receiver Fifth National Bank, to the Comptroller of the Currency, of date March 20th, 1890, and receipt accompanying it.

Said Exhibit E above referred to is in words and figures following, to wit:

EXHIBIT E.

(H. H. 993, 1884. In correspondence on this subject quote the above initials and file numbers.)

DEPARTMENT OF JUSTICE,
Washington, D. C., Dec. 20, 1889.

T. P. BASHAW, Esq.,
Late United States Attorney, St. Louis, Mo.:

SIR: In reference to Department letter to you of May 18th, 1889, stating that employment by the Attorney-General was not the source of your services, but that your appearance and services in the case of William H. Bliss vs. The United States, in the eastern district of Missouri, were by virtue of the statute, it is proper to say to you that when a district attorney is directed by statute to perform a specific service he is paid, so far as the responsibility of this Department is concerned, out of the appropriation for fees of district attorneys under the fee bill, or for unofficial services under section 3, page 109, volume 18, Stats. at Large, or under section 299, R. S.

Section 299, R. S., authorizing an assimilating of compensation to the rates of the fee bill "for services rendered in cases instituted in the courts of the United States or of any State when the United States is interested, but is not a party of record," etc. As your services were rendered in a United States court in a case where the United States was a party of record, section 299, R. S., does not apply.

Section 3, page 109, volume 18, Stats. at Large, authorizes the Department of Justice to pay district attorneys "for the performance
21 of services not covered by their salaries or fees." This section refers to unofficial services—those that are not directed by statute—and it authorizes the Department of Justice to pay for them. In the case under consideration you were directed by law (24 Stats. at Large, chapter 359, page 506, section 6), as follows: "* * * It shall be the duty of the district attorney * * * to appear and defend the interests of the Government in the suit, * * *." Section 3, page 109, of volume 18, above referred to, does not apply to your services, you not being employed by the Department of Justice, but being under official obligation to defend the interests of the Government; and whatever direction may have been given to you by this Department was subordinate to the general direction of the statute, your services being in the line of the discharge of the duties of a district attorney. You notice that the language above quoted lays an imperative duty upon the district attorney, without a specific direction as to what his fees are to be or how he is to be compensated, and inferentially permits him to charge only the customary statutory fees. It therefore appears that if you are to receive compensation through the agency of this Department under existing legislation, it is to be made under the fee bill.

Section 823, R. S., provides that "the following and no other compensation shall be taxed and allowed to attorneys * * * except in cases otherwise expressly provided by law." Your claim of $500.00 as compensation for your services in the case of Bliss vs. The United States does not fall within the cases otherwise expressly provided by law; and not falling within those cases the services, if payable from any appropriation, are payable in accordance with section 824, R. S., which provides that the fee shall be, "in cases of law, when judgment is rendered without a jury, ten dollars."

The above statement is made to you as the result of an examination of the question of your claim upon appropriations under the control, wholly or partially, of this Department, made with a desire to see how, within the terms of statute, any compensation other than the ten dollars last mentioned could be made to you, and I see no way of arriving at a conclusion other than that above stated, which conclusion is supported by the fact that other district attorneys, defending suits instituted by claimants against the United States for disallowances, similar to those embodied in the suit of Bliss vs. The United States, have charged ten dollars for such services, in the regular fee bill, and their accounts have been so adjusted by the accounting officers of the Treasury. This last item of information is communicated to the Department by officials in the First Auditor's and First Comptroller's offices.

A friend of yours, visiting the city, suggested to me that it was possible for me to pay you out of the appropriation made for defraying the expenses of defending suits in the Court of Claims. Reference to the act

providing for that appropriation shows that it is made "for defraying the necessary expenses incurred in the examination of witnesses and procuring of evidence in the matter of claims against the United States, and in defending suits in the Court of Claims * * * " and not for defending suits in courts other than the Court of Claims.

Very respectfully,

W. H. H. MILLER,
Attorney-General.

22 Said Exhibit 1, above referred to, is in words and figures following, to wit:

EXHIBIT 1.

(Copy.)

DEPARTMENT OF JUSTICE,
OFFICE OF THE SOLICITOR OF THE TREASURY,
Washington, D. C., Nov. 25th, 1887.

SIR: By request of the Acting Comptroller of the Currency, I have to instruct you to confer with Mr. Lon V. Stephens, receiver, and to take the proper action for the forfeiture of the charter of the Fifth National Bank of St. Louis.

Very respectfully,

F. A. KEEVE,
Acting Solicitor.

THOMAS P. BASHAW, Esq.,
U. States Attorney, St. Louis, Mo.

ST. LOUIS, MO., *December 10th,* 1889.

I certify that the foregoing is a true copy of the original letter as the same remains on file in the office of the U. S. attorney for the eastern district of Missouri.

GEO. D. REYNOLDS,
U. S. Atty., East. Dist. Mo.

Said Exhibit 2, above referred to, is in words and figures following, to wit:

EXHIBIT 2.

UNITED STATES SENATE,
Washington, D. C., March 30, 1889.

Hon. T. P. BASHAW.

MY DEAR JUDGE: On receipt of your favor of the 18th inst. I immediately applied to the Comptroller of the Currency, and herein send you his reply of the 25th inst. I thereupon applied to the Atty. Gen., and here send you his reply of the 29th inst. I saw Mr. Hodges, the clerk in the Atty. General's Office having charge of such matters, and he claimed, as the papers seem to show, that there was no appropriation out of which to pay such services, and therefore reported it to Congress for a deficiency appropriation, but too late for the deficiency appropriation bill of the last

session, and there is no remedy but to wait till Congress shall appropriate in the next session. I regret this exceedingly, and only wish you had let me know about this early in Feb. that I could have had it provided for.

With best wishes, sincerely your friend,

F. M. COCKRELL.

23 Said Exhibit 3, above referred to, is in words and figures following, to wit:

EXHIBIT 3.

(H. H. In any further correspondence on this subject quote the above initials.—30, 1888.—L. M. B.)

DEPARTMENT OF JUSTICE,
Washington, March 29, 1889.

Hon. F. M. COCKRELL,
United States Senate.

SIR: In answer to your inquiry of the 26th instant, you are informed that the claim of T. P. Bashaw, U. S. attorney for the eastern district of Missouri, for compensation for services in procuring the forfeiture of the charter of the Fifth National Bank of St. Louis, Missouri, was forwarded at the close of the last session of Congress to be included, by action of the Senate, in the deficiency bill, but it is understood that the claim was forwarded too late for Congressional action.

Very respectfully,

W. H. H. MILLER,
Attorney-General.

Said Exhibit 4, above referred to, is in words and figures following, to wit:

EXHIBIT 4.

(Address reply to "Comptroller of the Currency," Washington, D. C. R. F. D. C. J. S.)

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
Washington, D. C., March 25, 1889.

Hon. F. M. COCKRELL,
United States Senate.

SIR: I have the honor to acknowledge the receipt of your letter of the 20th inst., stating that you understand there is some trouble between this office and that of the Attorney-General with respect to the payment of an attorney's fee of $1,000 to Hon. T. P. Bashaw for services in procuring the forfeiture of the charter of the Fifth National Bank of St. Louis, and asking to be advised as to the status of the claim.

In reply you are respectfully informed that in October, 1888, the receiver of the Fifth National Bank of St. Louis informed this office that Judge Thos. P. Bashaw, United States district attorney, had notified him that he would ask for $2,000 for his services in the proceedings to forfeit the charter of the Fifth National Bank.

In reply to this letter the receiver was advised by the Comptroller October 29th, as follows: "Your only course is to refer the district attorney to the Department of Justice, as there is no statute under which funds of your trust can be used in payment for services rendered by him in the performance of his statutory duty.

24 "The United States district attorney for the southern district of Ohio in the Fidelity National Bank case presented his claim to the Department of Justice which took cognizance of the matter."

Since the above-named date no correspondence has been had with this office with respect to the matter.

Very respectfully,

J. D. ABRAHAMS,
Deputy and Acting Comptroller.

Said Exhibit 5, above referred to, is in words and figures following, to wit:

EXHIBIT 5.

DEPARTMENT OF JUSTICE,
Washington, D. C.

(H. H. 30, 1888. In correspondence on this subject quote the above initials and file number.—L. N. W.)

October 21, 1890.

T. P. BASHAW, Esq.
Late United States Attorney, St. Louis, Missouri:

SIR: Your letter of the 18th instant has been received about your account for services in procuring forfeiture of the charter of the Fifth National Bank of St. Louis, Missouri. No appropriation was made by Congress to pay for these services. The account was sent at first, among other accounts of various kinds for legal services, to Congress for its action. It declined to pass upon the propriety of paying the accounts, and returned them to the Attorney-General for his action upon each account, and reference of the same to the accounting officers of the Treasury. Under the circumstances the Attorney-General did not feel at liberty to approve any accounts that were not incurred under the authority of an Attorney-General.

The services of a district attorney in action to forfeit a charter of a national bank is under the control of the Comptroller of Currency and the Solicitor of the Treasury. An examination of the law and the facts bearing upon your claim shows that the Attorney-General is in no way responsible for the payment of your services; and, in fact, it is believed by the Department that similar services are properly payable at the time they are rendered out of the assets of the bank directly upon the order of the Comptroller of Currency.

Your account, therefore, with another of the same kind, is in the condition in which it was transmitted to this Department. Under the view above mentioned, it is not seen how the Department can take further action.

Very respectfully,

W. H. H. MILLER,
Attorney-General.

25 Said Exhibit 6, above referred to, is in words and figures following, to wit:

EXHIBIT 6.

(Copy.)

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., March 13, 1889.

T. P. BASHAW, Esq.,
United States Attorney, St. Louis, Missouri:

SIR: The Commissioner of Internal Revenue has referred to the Secretary your account for $825.00 for services, under section 838, R. S., in 165 internal-revenue cases, which you decided the ends of public justice did not require to be prosecuted.

In accordance with the rulings of this Department and the opinion of the Attorney-General, this account can not be allowed, because the cases were not tried or disposed of before a judge.

Respectfully, yours,

[SEAL.] I. H. MAYNARD,
Assistant Secretary.

Said Exhibit 7, above referred to, is in words and figures following, to wit:

EXHIBIT 7.

(Copy.)

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., March 18, 1889.

T. P. BASHAW, Esq.,
United States Attorney, St. Louis, Missouri:

SIR: The Commissioner of Internal Revenue, under date of the 13th instant, referred to the Secretary your account for $235.00 for services under section 838, R. S., in deciding not to prosecute 47 internal-revenue cases which had been reported to you by the collector of internal revenue.

In accordance with the rulings of this Department, and the opinion of the Attorney-General, this account can not be allowed, because the cases were not tried or disposed of before a judge, and consequently no judge can give the certificate which the law requires, and which is necessary as the basis of the Secretary's allowance.

Respectfully, yours,

[SEAL.] I. H. MAYNARD,
Assistant Secretary.

26 Said Exhibit 8, above referred to, is in words and figures following, to wit:

EXHIBIT 8.

(Copy.)

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., May 26, 1890.

WM. W. DUDLEY, Esq.,
Attorney and Counsellor at Law, Washington, D. C.:

SIR: Upon receiving your letter of the 12th instant relating to the account for $300.00 of Judge T. P. Bashaw, late United States attorney for the eastern district of Missouri, for services in what are known as the "Schmidt cases," for violation of the contract-labor law, the account, with accompanying papers, was referred to the Solicitor of the Treasury for his opinion as to whether the Secretary is authorized to pay the account.

In his answer, dated the 23rd instant, the Solicitor, referring to the alien contract-labor law, says:

"It is made the duty of the district attorney of the proper district to prosecute every suit at the expense of the United States, but this neither expressly nor by necessary implication authorizes the payment of extra compensation to either district attorneys, marshals, or clerks. It means that their lawful fees and costs, as now provided for, shall be paid by the United States.

"I am therefore of the opinion that the Secretary of the Treasury is not authorized by law to pay Mr. Bashaw's account."

Concurring in this opinion the account of Mr. Bashaw is disallowed.

Respectfully, yours,

[SEAL.] W. WINDOM,
Secretary.

Said Exhibit 9, above referred to, is in words and figures following, to wit:

EXHIBIT 9.

MARCH 20, 1890.

COMPTROLLER OF THE CURRENCY,
Washington City, D. C.:

DEAR SIR: Enclosed you will find an account against me as receiver of the Fifth Nat. Bank for $600, of Judge Thos. P. Bashaw, ex-U. S. district att'y for the eastern district of Missouri.

Also find his receipt for same.

The judge rendered me sundry services at times when our directors became frightened, and I think he is entitled to a fee. He thinks he should be paid very largely in excess of this amount, but after consulting with him, and the doubtful propriety of litigation over the matter, he is willing to receipt in full for all services rendered for $600. I trust you will allow the same, and reply at earliest opportunity.

Very resp'y,

[SEAL.] (Signed) LON V. STEPHENS,
Receiver.

27 Lon V. Stephens, receiver of the Fifth National Bank, St. Louis, to T. P. Bashaw, Dr.

To sundry services rendered said receiver by him while U. S. district attorney for the eastern district of Missouri $600.00

Received, Jefferson City, Mo., M'ch 20, 1890, of Lon V. Stephens, six hundred dollars in full of the above account and of all demands against him as such receiver.

[SEAL.] (Signed) T. P. BASHAW,
Late U. S. Att'y, E. Dis. of Mo.

And afterwards, to wit, on the fifteenth day of June, A. D. 1891, the following among other proceedings were had and appear of record in said cause, to wit:

Judgment.

THOMAS P. BASHAW, PLAINTIFF,
vs. } 3503.
UNITED STATES, DEFENDANT.

Now come the parties by their attorneys, and this cause having been heretofore submitted to the court upon the pleadings and proofs, upon consideration whereof, and being fully advised in the premises, the court finds the issues for the plaintiff upon the second, third, and fifth counts of the petition, and doth assess his damages as follows: Upon the said second count at the sum of eight hundred and twenty-five dollars ($825.00); upon the third count at the sum of two hundred and thirty-five dollars ($235.00), and upon the fifth count of said petition at the sum of ten dollars ($10.00), making a total of one thousand and seventy dollars ($1,070.00). And the court further finds the issues joined upon the first and fourth counts of the petition for the defendant.

It is therefore considered, determined, and adjudged by the court that the plaintiff, Thomas P. Bashaw, have and recover of the United States the sum of one thousand and seventy dollars, the damages aforesaid by the court assessed, as well as his costs and charges herein expended, and that a copy of this judgment and of the within findings of the court, together with its opinion thereon, be certified to the Attorney-General of the United States pursuant to law.

It is further considered by the court that the plaintiff take nothing by his writ as to said first and fourth counts of the petition and that as to said counts the defendant go hence without day.

In the circuit court of the United States for the eastern division of the eastern judicial district of Missouri.

THOMAS P. BASHAW
vs.
UNITED STATES.

Thomas M. Knapp, attorney for plaintiff.
George D. Reynolds, United States attorney for defendant.

FINDINGS.

1. Under the first count of the petition the court finds the facts to be substantially as therein stated, that is to say, the court finds that
28 William H. Bliss, late United States district attorney for this district at the time stated in the petition, sued the United States for fees earned as district attorney; that Thomas P. Bashaw, the plaintiff herein, who was United States district attorney for the eastern district of Missouri at the time said suit was brought, defended the same for and in behalf of the United States, and rendered the services in the petition stated; that the services so rendered were of the value stated in the petition, that is to say, of the value of five hundred ($500.00) dollars, and that the plaintiff has only been paid on account of said services the sum of ten dollars.

2. The court further finds the facts to be as stated in the second and third counts of the petition, that is to say, the court finds that between the 28th day of January, 1887, and first day of July, 1888, the collector of internal revenue for the first collection district of Missouri reported to the plaintiff herein (who was then United States district attorney for the eastern district of Missouri) divers and sundry cases of alleged violations of the internal-revenue laws of the United States, to the number of 165; that the plaintiff inquired into and examined each of said cases, and that upon such inquiry and examination decided that proceedings therein could not probably be sustained, and that the ends of justice did not require that such proceedings should be prosecuted, and that he thereupon made a report of the facts in such cases to the Commissioner of Internal Revenue for his direction. The court finds that the plaintiff's services were reasonably worth the sum of five dollars in each of said cases, to wit, total sum of eight hundred and twenty-five ($825.00) dollars.

That between the first day of July, 1888, and the 31st day of December, 1888, he made like examination and report in forty-seven other cases of alleged violations of the internal-revenue laws which were reported to him by said collector of internal revenue; that the plaintiff's services in each of the said forty-seven cases was likewise reasonably worth the sum of $5.00 per case, or the total sum of two hundred and thirty-five ($235.00) dollars.

3. The court also finds the facts to be substantially as stated in the fourth count of the petition herein, that is to say, the court finds that plaintiff as district attorney on the 31st day of August, 1888, brought twelve suits in the name of the United States against Harry A. Schmidt to recover penalties for the importation by him of twelve aliens into this country when they were under contract to perform labor in the United States; that the plaintiff during the time he was district attorney rendered

services for and in behalf of the United States in said suits that were reasonably worth the sum of three hundred ($300.00) dollars; that said twelve suits were pending and undetermined in the United States circuit court at the time the plaintiff herein was removed from office as district attorney, and that said 12 suits were eventually compromised and dismissed by the Government without any judgment being rendered therein

4. The court also finds the facts to be substantially as stated in the fifth count of plaintiff's petition; that is to say, the court finds that on the twenty-fifth day of November, 1887, the plaintiff herein, by direction of the Comptroller of the Currency, brought an action in the United States circuit court for the eastern district of Missouri to forfeit the charter of the Fifth National Bank of St. Louis, Missouri, and in the course of
29 said proceedings obtained a decree of forfeiture on the 21st day of May, 1888; that the plaintiff's services in conducting said suit were reasonably worth the sum stated in said petition, to wit, the sum of one thousand ($1,000.00) dollars, and that he has received nothing on account of said services.

The court further finds that the plaintiff entered upon the discharge of his duties as United States district attorney for the eastern district of Missouri on the 28th day of January, 1887, and that his successor in office was duly appointed and qualified on the 28th day of May, 1889.

CONCLUSIONS OF LAW.

First. The plaintiff is not entitled to recover on the first count of the petition.

The fee which the United States district attorney is entitled to recover for services such as were rendered in the case of Bliss vs. United States, mentioned in the first count of the petition, is determined by section 824, Revised Statutes of the United States, and it appears that the plaintiff has already received the compensation prescribed by that section, to wit, $10.00.

Second. Plaintiff is entitled to recover the sum of $825.00 under the second count of the petition, and the sum of $235.00 under the third count of the petition.

In so deciding the court adheres to the views expressed by Judge Treat, 23 *Fed.* Rep., page 26 to 29, inclusive, that under section 838, Revised Statutes of the United States, a district attorney may recover reasonable compensation for services rendered and expenses incurred in making an examination into alleged violations of the internal-revenue laws reported to him by the collector, although no proceedings are instituted in court.

Third. I conclude that plaintiff is not entitled to recover under the fourth count of the petition. I know of no provision of law that would authorize the court to render a judgment against the United States, on the state of facts alleged and proven, to sustain that count.

Fourth. I also conclude that plaintiff is not entitled to recover more than ten dollars under the fifth count of the petition. There seems to be no law of the United States giving compensation to a district attorney for such services as are described in that count, unless it be section 824. I conclude that he is entitled to a judgment in the sum of ten dollars, by virtue of section 824, on the the fifth count.

A judgment as herein indicated on the second, third, and fifth counts will accordingly be entered.

And afterwards, to wit, on the second day of September, A. D. 1891, the following further proceedings were had and appear of record in said cause, to wit:

Assignment of errors filed.

THOMAS P. BASHAW, PLAINTIFF,
vs.
THE UNITED STATES, DEFENDANT. } 3503.

Now comes the defendant by attorney and files assignment of errors herein.

30 Said assignment of errors is in words and figures following, to wit:

Assignment of errors.

IN THE CIRCUIT COURT OF THE UNITED STATES
In and for the Eastern Division of the Eastern Judicial District of Missouri, ss:

THOMAS P. BASHAW
vs.
THE UNITED STATES. } No. 3503. Assignment of errors.

Now comes the United States, defendant in the above-entitled cause, by Geo. D. Reynolds, its attorney in and for the eastern district of Missouri, and says that there was error committed by the honorable court in the above entitled cause, in this, to wit:

First. The court erred in overruling the objection of defendant's counsel to the hearing of any evidence on any of the counts in the petition of plaintiff, for the reason that in none of said counts was there any cause of action stated against the United States, nor any state of facts set out, that rendered the United States liable to the plaintiff.

Second. The court erred in receiving any testimony on the second count or cause of action of plaintiff's petition for the reason that the facts stated in said second count did not entitle the plaintiff to any judgment.

Third. The court erred in holding that plaintiff was entitled to recover the sum of eight hundred and twenty-five dollars, or any other sum, under the second count of his petition.

Fourth. The court erred in hearing any testimony under the third count in the petition of plaintiff, for the reason that said third count showed on its face that plaintiff was not entitled to recover on the cause of action therein stated.

Fifth. The court erred in finding that plaintiff was entitled to recover the sum of two hundred and thirty-five dollars, or any other sum, under the third count of the petition.

Sixth. The court erred in rendering judgment in favor of plaintiff on the second and third counts of the petition.

Seventh. The court erred in rendering judgment for the sum of ten dollars, or any other sum, under the fifth count in the petition, and erred in finding that plaintiff was entitled to recover anything on said fifth count of the petition.

Eighth. The court erred in hearing any testimony as to the fifth count in the petition, or rendering any judgment thereon in favor of the plain-

tiff for any sum, for the reason that it did not appear that plaintiff had ever rendered any account to the United States for the ten dollars, found by the court to be due him, on account of the services set out in the fifth count of the petition.

Ninth. The court erred in finding the plaintiff was entitled to recover anything in the said suit, and the judgment and finding should have been for the defendant on all the counts in the petition.

GEO. D. REYNOLDS,
U. S. Attorney.

31 And afterwards, to wit, on the tenth day of September, A. D. 1891, the following further proceedings were had and appear of record in said cause, to wit:

Appeal allowed—Citation signed.

THOMAS P. BASHAW, PLAINTIFF,
vs.
UNITED STATES, DEFENDANT. } 3503.

Now comes the defendant, by district attorney, and prays an appeal from the judgment of this court herein to the United States circuit court of appeals, eighth circuit, and presents to the court a citation, citing and admonishing the said plaintiff to be and appear at the United States circuit court of appeals, eighth circuit, at St. Louis, Missouri, sixty days from and after this date, which said appeal is allowed and said citation signed by the judge. And it is ordered by the court that the clerk make out and certify to said court of appeals a full and complete transcript of the record and proceedings in this cause.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss:

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern division of the eastern judicial district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the record, pleadings, and proceedings, in case No. 3503, of Thomas P. Bashaw, plaintiff, against the United States, defendant, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in the eastern division of said district, this 15th day of September, in the year of our Lord eighteen hundred and ninety-one.

[SEAL.]

A. P. SELBY,
Clerk of said Court.

(Indorsed:) No. 3503. United States circuit court, eastern division of the eastern judicial district of Missouri. Thomas P. Brashaw against the United States. Duly certified transcript of the record in the above entitled cause.

(Indorsement on cover:) No. 25. The United States, appellant, vs. Thomas P. Brashaw. E. Missouri, C. C. U. S. Filed September 15, 1891.

32 And on the twenty-fifth day of September, A. D. 1891, the appearance of counsel for appellant was filed in the clerk's office of said circuit court of appeals, in the words and figures following:

United States circuit court of appeals, eighth circuit.

THE UNITED STATES, APPELLANT,
vs.
THOS. P. BASHAW. } October term, 1891. No. 25.

The clerk will enter my appearance as counsel for the appellant.
GEO. D. REYNOLDS.

(Endorsed:) "U. S. circuit court of appeals, eighth circuit. 1891, October term. No. 25. United States, applt., vs. Thomas P. Bashaw, appellee. Appearance. Filed Sep. 25, 1891. John D. Jordan, clerk. Geo. D. Reynolds, St. Louis, Mo., counsel for appellant."

And on the tenth day of October, A. D. 1891, the appearance of counsel for appellee was filed in the clerk's office of said circuit court of appeals, in the words and figures following:

United States circuit court of appeals, eighth circuit.

THE UNITED STATES, APPELLANT,
vs.
THOMAS P. BASHAW. } October term, 1891. No. 25.

The clerk will enter our appearance as counsel for the appellee.
THOMAS M. KNAPP &
THOMAS R. HARRIS.

(Endorsed:) "U. S. circuit court of appeals. Eighth circuit. 1891. October term. No. 25. United States, appellant, vs. Thomas P. Bashaw, appellee. Appearance. Filed Oct. 10, 1891. John D. Jordan,
33 clerk. Thomas M. Knapp and Thomas R. Harris, St. Louis, Mo., counsel for appellee."

And on the fourth day of May, A. D. 1892, in the record of the proceedings of said circuit court of appeals, is an entry in said cause, in the words and figures following, to wit:

United States circuit court of appeals, eighth circuit. October term, 1891.

WEDNESDAY, *May* 4, 1892.

UNITED STATES OF AMERICA, APPELLANT,
vs.
THOMAS P. BASHAW, APPELLEE. } No. 25.

Appeal from circuit court of the United States for the eastern judicial district of Missouri.

This cause came on to be heard and was submitted to the court without argument upon the briefs filed by Mr. Geo. D. Reynolds, in behalf of appellant, and by Mr. Thomas M. Knapp, in behalf of appellee.

And on the twenty-third day of May, A. D. 1892, in the record of the proceedings of said circuit court of appeals, is a judgment in said cause in the words and figures following, to wit:

United States circuit court of appeals, eighth circuit. October term, 1891.

MONDAY, *May* 23, 1892.

UNITED STATES OF AMERICA, APPELLANT,
vs.
THOMAS P. BASHAW, APPELLEE. } No. 25.

Appeal from the circuit court of the United States for the eastern judicial district of Missouri.

34 This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern judicial district of Missouri, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed.

MAY 23, 1892.

And on the said twenty-third day of May, A. D. 1892, an opinion of said court was filed in said cause in words and figures following, to wit:

35 United States circuit court of appeals, eighth circuit.

No. 25.—October term, A. D. 1891.

UNITED STATES, APPELLANT,
vs.
THOMAS P. BASHAW, APPELLEE. } Appeal from the circuit court of the United States for the eastern district of Missouri.

Mr. George D. Reynolds, for appellant.

Mr. Thomas M. Knapp, Mr. Thomas R. Harris, for appellee.

Before Caldwell and Sanborn, circuit judges, and Shiras, district judge.

SHIRAS, *District Judge:*

At the September term, 1890, of the circuit court for the eastern district of Missouri, the appellee brought an action against the United States to recover compensation for certain services rendered by him during the years 1887–1888 in the capacity of district attorney for the United States in said eastern district of Missouri. The petition contained five counts, the second and third being based upon services rendered by the district attorney in examining into a number of alleged violations of the internal-revenue laws of the United States, and which had been referred to him for examination by the collector of the district under the provisions of section 838, Revised Statutes. The trial court found in favor of the plaintiff on these counts, and from this ruling and the judgment based thereon the United States has appealed to this court.

The question at issue, as stated in the first, second, and fourth assignments of error, is that the court below erred in receiving any testimony in

support of the causes of action set forth in the second and third counts of the petition, for the reason that the facts therein stated did not show any cause of action against the United States.

These facts, briefly stated, are that the collector of internal revenue for the first collection district of Missouri, during the years 1887–1888, reported to the plaintiff, as district attorney, that violations of the internal-revenue laws had been committed in a number of cases; that the plaintiff, as required by law, examined into these cases and the facts thereof, and after such inquiry and examination he reported that proceedings therein could not probably be sustained, and that the ends of justice did not require prosecutions therein; that the services thus rendered were reasonably worth the sum of five dollars in each case; that plaintiff duly made out his claim for expenses and services incurred and rendered in these cases, and submitted the same to the district judge for the eastern district of Missouri, who duly allowed and certified the same; that said claim so certified was presented to the Treasury Department of the United States, and that the defendant wrongfully neglects and refuses to pay the same.

36

The question for determination is thus narrowed down to the single proposition whether, under the provisions of section 338 of the Revised Statutes, the district attorney is entitled to compensation for services rendered in cases in which no prosecution is instituted, the theory of the Government being that to entitle the district attorney to recompense for services of this nature suit must be brought.

Section 838, Revised Statutes, reads as follows: "It shall be the duty of every district attorney to whom any collector of customs or of internal revenue shall report, according to law, any case in which any fine, penalty, or forfeiture has been incurred in the district of such attorney for the violation of any law of the United States relating to the revenue, to cause the proper proceedings to be commenced and prosecuted without delay for the fines, penalties, and forfeitures in such case provided, unless, upon inquiry and examination, he shall decide that such proceedings can not probably be sustained or that the ends of public justice do not require that such proceedings be instituted; in which case he shall report the facts in customs cases to the Secretary of the Treasury and in internal-revenue cases to the Commissioner of Internal Revenue for their direction. And for the expenses incurred and services rendered in all such cases the district attorney shall receive and be paid from the Treasury such sum as the Secretary of the Treasury shall deem just and reasonable, upon the certificate of the judge before whom such cases are tried or disposed of: Provided, That the annual compensation of such district attorney shall not exceed the maximum amount prescribed by law, by reason of such allowance and payment."

The section in express terms makes it the duty of the district attorney to examine into every case of supposed violation of the internal-revenue laws referred to him by the collector, for the purpose of determining whether proceedings for fines and penalties can be sustained and whether public justice requires the institution of proceedings, and, in the cases wherein the conclusion is in the affirmative, to institute the proper proceedings; and in the cases wherein the conclusion is against the propriety of proceeding therein, then the district attorney must report the facts to the Commissioner of Internal Revenue. Thus it is made the duty of the

district attorney to examine into and take action, either by institution of proceedings or by report adverse thereto to the commissioner, in every case of alleged violation of the revenue laws referred to him by the collector, and then the section declares that, "for the expenses incurred and services rendered in all such cases, the district attorney shall
37 receive and be paid from the Treasury, etc." What cases are included within the words "in all such cases?" Do not these words clearly refer to the cases previously mentioned in the section, to wit, the cases reported by the collector to the district attorney for examination? If the reference is to the cases reported by the collector for examination (and in our judgment no other construction is admissible), then the section clearly enacts that the district attorney is entitled to be paid for expenses incurred and services rendered in all cases reported to him for examination by the collector, regardless of the results of such examination. Unless compelled to do so by clear and unambiguous language, we ought not to hold that the Congress of the United States in the enactment of a statute clearly intended to protect the individual citizens, as well as the United States, against the institution of proceedings not called for in the furtherance of justice, warned the district attorneys of the United States that they could not expect compensation for the expenses incurred and the services rendered by them in making the examinations provided for in the statute, unless they should find cause for the institution of proceedings. Such a construction would not only tend to defeat the very purpose of the enactment, but it would, in effect, place the Government in the attitude of making the question of compensation for the services rendered depend, not upon the fact of the rendition of the services, but upon the fact that the conclusion reached was in favor of the claim asserted by the Government. That which is demanded of the district attorney by the section in question is examination into facts and a determination of what public justice requires, which services are certainly judicial or quasi judicial in their nature, and it is repugnant to all just principles that compensation for judicial services should ever be made dependent upon the results of the decision rendered.

The position taken on behalf of the United States is clearly and briefly stated in a ruling made by Secretary Folger in 1884 and cited in the brief of counsel, in which he states: I am of the opinion that the Secretary can have no jurisdiction and hence no power to make an allowance under that section, unless there is a judge's certificate, and that no judge can give the required certificate except in cases that have been 'tried or disposed of before' him as judge." We agree in the view that the basis for the action of the Secretary of the Treasury is the certificate of the proper judge, but we do not concur in the proposition that no certificate can be properly made except as to cases actually tried or disposed of before a judge. The section provides that the attorney shall "in all such cases," that is, in all cases reported to him for examination, be paid such sums as the Secretary of the Treasury shall deem just upon the certificate of the judge "before whom such cases are tried or disposed of." Section 838 includes "violations of any law of the United States relating to the revenue."

These violations may occur in a State, a Territory, or in the District of Columbia. The name or description of the judge before whom persons charged with violating the provisions of the statutes of the United

States in regard to customs, internal revenue, and the like are triable depends upon the locality wherein the offense may have been committed. Instead of defining by official name or description the different judges who are authorized to give the certificate when the offenses reported on
38 have been committed in a State or in a Territory or in the District of Columbia, the section covers the whole ground by declaring that the certificate shall be given by the judge "before whom such cases are tried or disposed of." In other words, the judge who is competent to try "such cases" is competent to grant the certificate.

It will be remembered that the facts to be certified to are not matters arising on the trial of cases before the certifying judge. The services for which compensation is sought under this section are all rendered before any proceedings in court are instituted, and the facts upon which the certificate is based must be proven before the certifying judge without regard to the question whether a trial has been had or not, because the evidence adduced on the trial would not show whether the attorney had or had not incurred expense or rendered service in examining into the case before the institution of proceedings. In other words, it is not necessary, in order to enable the judge to give the proper certificate, that the cases should have been tried before him, because all that he could learn on such trial would not give him the information upon which his certificate must be based, and, therefore, no weight can be given to the argument that compensation can not be made to the attorney for services in cases not brought to trial, because such trial is needed in order to enable the judge to make the requisite certificate. If this limited view of the section is correct, it would follow that if a district attorney had rendered services in cases reported to him by the collector, had brought suits thereon, and had tried the causes, but before his account had been certified to by the trial judge the latter had died or resigned, the attorney could not recover compensation, because he could not furnish the certificate of the trial judge, although his successor in office might certify to all the necessary facts.

It is also urged in argument on behalf of the United States that the prior action of the Treasury Department should be given controlling weight in the construction of this section, on the familiar principle that in cases of ambiguity the construction put upon the statute by the Department charged with its execution, and which has been received and acted upon, should not subsequently be changed by judicial interpretation, except for cogent reasons. The facts of this case do not bring it within the rule invoked. Parties have not acted, nor have rights been acquired, upon the faith or foundation of any ruling by the Treasury Department upon this question of the right of the district attorney to compensation for services rendered; nor can it be properly said that there is any settled departmental rule adverse to the claim made by the district attorney. The section requires action to be taken primarily by the judge of the proper district in certifying to the account of the attorney. In 1885 this question was carefully examined by Judge Treat, then occupying the position of district judge for the eastern district of Missouri, and he held that the district attorney was entitled to compensation for services rendered, regardless of the question whether proceedings were or were not instituted therein. (See 23 Fed. Rep., 26.) The conclusion then reached by Judge Treat has been recognized as the correct interpretation of the statute in the eastern district

of Missouri from that day to this. Furthermore, in the opinion given by Attorney-General Garland in 1885, and cited by counsel for the United States, it is stated that the Solicitor of the Treasury accords with
39 Judge Treat in the construction of the statute, thus showing that there was not agreement upon the matter in the departments at Washington. The fact that the Secretary of the Treasury since 1885 has been guided by the opinion then given by the Attorney-General, contrary to the views of the Solicitor of the Treasury, is not sufficient to prove an established departmental rule, in view of the further fact that the ruling of the Attorney-General was adverse to that made and adhered to by the judges of the eastern district of Missouri when called upon to adjudge the question.

On the contrary, from the record before us, it appears that this question has been an open one from the beginning, and that there is no just ground for holding that the district attorney is debarred from demanding at the hands of the court an interpretation of the statute, regardless of the action of the Treasury Department in refusing payment of his account. In support of the position taken by the United States, the case of Stanton v. United States (37 Fed. Rep.,252) is cited, wherein Judge Shipman held that if section 838 was the only one which relates or has related to the question, the construction claimed by the district attorney would seem to be correct; but that as section 838 was an amendment in 1873 of the seventh section of the act of July 18th, 1866, and as the latter act expressly declared that compensation should be given for expenses incurred and services rendered in prosecutions for such fines and personal penalties, it must be assumed, notwithstanding the change in the words used in the two statutes, that Congress, in the enactment of the amendment, only intended to include internal-revenue cases with custom cases, and did not intend to change the provisions of the act of 1866 in regard to compensation to the attorney. It is a fundamental rule of construction that, if possible, force must be given to all the words used therein, and also that when a previous statute is amended by an alteration of the terms used therein, it is to be presumed that it was the intent to alter the meaning of the previous act in that particular. If it was the intent of Congress, in passing the amendatory act of 1873, to leave the question of compensation to the attorney unchanged, why was it that Congress struck out the words "for expenses incurred and services rendered in prosecutions for such fines and personal penalties, etc.," and inserted the words found in section 838? The natural presumption is that the phraseology of the statute was changed in order to change its meaning. The very fact that the prior act is amended demonstrates the intent to change the pre-existing law, and the presumption must be that it was intended to change the statute in all the particulars touching which we find a material change in the language of the act. If according to the theory of the Stanton case, the only purpose of Congress, in adopting the amendment of 1873, was to add internal-revenue cases to the class of cases which might be reported to the district attorney for his examination and action thereon, why change the language of that clause of the act of 1866 which limited the right of compensation to expenses incurred and services rendered in prosecutions for fines and penalties? It is admitted in the opinion in the Stanton case that the language found in section 838 justifies the construction put thereon by the district attorney. This is tantamount to saying that

this clause of section 838, if construed by itself, does not mean the same thing as the corresponding clause in the act of 1866. Is it not then a forced construction of section 838 to hold that the difference in the language must go for naught upon the assumption that Congress only intended to enlarge the statute of 1866 by including within its provisions cases arising under the internal-revenue laws? In our judgment, the change in the language used in the amendatory act of 1873 must be given its legitimate force, and the fair and natural meaning of the words used in the section ought not be narrowed in the attempt to make its meaning conform in this particular to the previous statute.

There can not be any doubt of the burdens placed by the section upon the district attorney. It is plainly made his duty to examine into every case reported to him by the collectors of customs or of the internal revenue, and to determine whether they should or should not be prosecuted. No less direct and unequivocal is the declaration of the section that "for the expenses incurred and services rendered in all such cases the district attorney shall be paid." The question of payment or no payment is not left open by the statute. It is not left to the discretion of the Secretary of the Treasury or of a judge to determine whether payment shall be made. The statutory declaration is that in all such cases the district attorney shall be paid such reasonable sum as the proper judge shall certify and as shall be approved by the Secretary of the Treasury. The right to compensation is acquired by the rendition of services in the examination of cases reported to the attorney for examination by the collectors of customs and of revenue. The amount to be paid is to be ascertained by proving the facts before the proper judge, obtaining his certificate, and the approval of the Secretary of the Treasury. The purpose of the statute being clearly shown by a consideration of all its provisions, this purpose is not to be defeated because there are to be found in the statute some words or expressions which, if literally construed, would militate against the meaning given the statute as a whole. In such cases courts are required to give to such words or clauses not a literal construction, but one which will give effect to the clear intent of the legislature as the same is gathered from the entire statute. Thus it is said by the Supreme Court in Heydenfeldt v. Daney Gold, etc., Co. (93 U. S., 634): "If a literal interpretation of any part of it would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected." (See also Rector, Churchwardens, etc., v. United States, 144 U. S. —.)

In our judgment section 838, taken as a whole, clearly declares that the district attorney is entitled to compensation for services rendered in all cases reported to him for examination under its provisions, regardless of the question whether suits are in fact instituted or not, and this clearly expressed purpose is not to be changed or modified by reason of the ambiguity created by the phrase "upon the certificate of the judge before whom such cases are tried or disposed of." These words can be construed so as to give a harmonious meaning to the entire section, and the literal construction of the particular clause must yield to the broader meaning demanded by the section as a whole.

In view of this conclusion the judgment of the court below must be and is affirmed.

Filed May 23, 1892.

41 And on the twenty-fifth day of June, A. D. 1892, a mandate was issued in said cause, directed to the judges of the circuit court of the United States for the eastern judicial district of Missouri, in words and figures following, to wit:

[SEAL.] UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable the judges of the circuit court of the United States for the eastern judicial district of Missouri, greeting:

Whereas lately, in the circuit court of the United States for the eastern judicial district of Missouri, before you or some of you, in a cause between Thomas P. Bashaw, plaintiff, and the United States, defendant, wherein the judgment of the said circuit court, entered in said cause on the 15th day of June, A. D. 1891, is in the following words, viz:

Now come the parties by their attorneys, and this cause having been heretofore submitted to the court upon the pleadings and proofs, upon consideration whereof, and being fully advised in the premises, the court finds the issues for the plaintiff upon the second, third, and fifth counts of the petition, and doth assess his damages is follows: Upon the said second count at the sum of eight hundred and twenty-five dollars ($825.00); upon the third count at the sum of two hundred and thirty-five dollars ($235.00); and upon the fifth count of said petition at the sum of ten dollars ($10.00), making a total of one thousand and seventy dollars ($1,070.00). And the court further finds the issues joined upon the first and fourth counts of the petition for the defendant.

It is therefore considered, determined, and adjudged by the court that the plaintiff, Thomas P. Bashaw, have and recover of the United States the sum of one thousand and seventy dollars, the damages aforesaid by the court assessed, as well as his costs and charges herein expended,

42 and that a copy of this judgment and of the within findings of the court, together with its opinion thereon, be certified to the Attorney-General of the United States pursuant to law.

It is further considered by the court that the plaintiff take nothing by his writ as to said first and fourth counts of the petition, and that as to said counts the defendant go hence without day; as by the inspection of the transcript of the record of the said circuit court, which was brought into the United States circuit court of appeals, eighth circuit, by virtue of an appeal agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and ninety-one, the said cause came on to be heard before the said United States circuit court of appeals, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause, be, and the same is hereby, affirmed. May 23, 1892.

You, therefore, are hereby commanded that such proceedings be had in said cause, as according to right and justice, and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the twenty-fifth day of June, in the year of our Lord one thousand eight hundred and ninety-two.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

(Endorsed:) United States circuit court of appeals. No. 25. October term, 1891. The United States vs. Thomas P. Bashaw. Mandate.

43 And on the twenty-seventh day of June, A. D. 1892, an assignment of errors by counsel for appellant was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following:

In the United States circuit court of appeals in and for the eighth judicial circuit.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
THOMAS P. BASHAW. } No. 25.

Assignment of errors.

Now comes the United States, appellant in said cause, and assigns the following for error in the judgment and decree of this court in said cause.

1st. The court erred in affirming the decision of the lower court.

2nd. The court erred in holding that the respondent was entitled to any fees under section 838, or under any other provision of law, in causes not disposed of in court.

3rd. The court erred in holding that respondent was entitled to any recovery in said cause on any account therein set out.

GEO. D. REYNOLDS,
United States Attorney.

(Endorsed:) No. 25. October term, A. D. 1891. United States circuit court of appeals. Eighth circuit. United States, appellant, vs. Thomas P. Bashaw. Assignment of errors. Filed Jun. 27, 1892. John D. Jordan, clerk.

And on the twenty-seventh day of June, A. D. 1892, there was in said circuit court of appeals, by counsel for appellant, a petition for allowance of appeal to the Supreme Court of the United States, in words and figures following:

44 In the United States circuit court of appeals in and for the eighth judicial circuit.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
THOMAS P. BASHAW. } No. 25.

Now comes the United States, by W. H. H. Miller, its Attorney-General, and Geo. D. Reynolds, its attorney in said cause, and prays an appeal herein to the Supreme Court of the United States.

W. H. H. MILLER,
Attorney-General.

Pr. R.

GEO. D. REYNOLDS,
U. S. Attorney, Eastern District of Missouri.

(Endorsed:) United States circuit court of appeals. Eighth circuit. No. 25. October term, 1891. United States of America, appellant, vs. Thomas P. Bashaw. Petition for allowance of appeal to Supreme Court United States. Filed Jun. 27, 1892. John D. Jordan, clerk.

And on the twenty-seventh day of June, A. D. 1892, there was filed in the clerk's office of said circuit court of appeal, in said cause, an order allowing appeal to Supreme Court, in words and figures following:

United States circuit court of appeals, eighth circuit.

October term, 1891.

MONDAY, *June 27th*, 1892.

UNITED STATES OF AMERICA, APPELLANT,
vs.
THOMAS P. BASHAW, APPELLEE. } No. 25.

In this cause it is ordered on the petition of the appellant that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States in this cause.

HENRY C. CALDWELL,
Judge U. S. Circuit Court of Appeals for the Eighth Circuit.

45 (Endorsed:) U. S. circuit court of appeals. Eighth circuit. No. 25. October term, 1891. United States of America, appellant, vs. Thomas P. Bashaw. Order allowing appeal to Supreme Court U. S. Filed Jun. 27, 1892. John D. Jordan, clerk.

And on the fifth day of July, A. D. 1892, a citation on appeal was filed in the clerk's office of said circuit court of appeals, in said cause, the original of which is hereto attached and herewith returned.

46 THE UNITED STATES OF AMERICA.

To Thomas P. Bashaw, greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, D. C., thirty days from and after the day this citation bears date, pursuant to an appeal allowed and filed in the clerk's office of the U. S. circuit court of appeals for the eighth circuit, wherein the United States of America is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the United States of America, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the honorable Henry C. Caldwell, judge of the United States circuit court of appeals for the eighth circuit, this 27th day of June, in the year of our Lord one thousand eight hundred and ninety-two.

HENRY C. CALDWELL,
Judge of the United States Circuit Court of Appeals for the Eighth Circuit.

I hereby acknowledge service of the foregoing and within notice on me at St. Louis, Mo., this 30th day of June, A. D. 1892.

THOMAS P. BASHAW.

(Indorsed:) No. 25. Supreme Court of the United States. United States of America, appellant, vs. Thomas P. Bashaw. Citation on appeal. Filed Jul. 5, 1892. John D. Jordan, clerk.

I, John D. Jordan, clerk of the United States circuit court of appeals, eighth circuit, do hereby certify that the foregoing pages, number from one to 46, inclusive, contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of said circuit court of appeals in the case of The United States of America, appellant, vs. Thomas P. Bashaw, appellee, No. 25, October term, 1891, as the same remain upon the files and records of said United States circuit court of appeals. I further certify that the original citation in said cause is hereto attached and herewith returned.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this sixteenth day of July, A. D. 1892.

[SEAL.] JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

(Indorsed on cover:) Case No. 15090. Term No. 1120. The United States, appellant, vs. Thomas P. Bashaw. Filed July 23, 1892. United States circuit court of appeals, eighth circuit. Supreme Court, U. S. Clerk's office. Received Jul. 20, 1892.

Office Supreme Court U. S.
FILED.
JAN 5 1894
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1893.

THE UNITED STATES, APPELLANTS,
vs.
THOMAS P. BASHAW, APPELLEE.
} Term No. 779.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

Supreme Court of the United States.

OCTOBER TERM, 1893.

THE UNITED STATES, APPELLANTS,
vs.
THOMAS P. BASHAW, APPELLEE.
} Term No. 779.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

The appellee, Thomas P. Bashaw, was formerly and at the time of the transactions which led to this suit, the district attorney of the United States for the eastern district of Missouri. The collector of internal revenue for that district reported to him for investigation certain cases in which it was alleged that fines, penalties, and forfeitures had been incurred for violations of the laws of the United States relating to the revenue.

These investigations were made as required under the provisions of section 838 of the Revised Statutes, and a claim of $5 for each case investigated in which he decided that proceedings could not probably be sustained, or that

the ends of public justice did not require them to be instituted, was made. The Secretary of the Treasury refused to pay the same, holding that he had no authority under the law to allow any pay in cases where no proceedings are instituted. Two of such accounts were presented, one amounting to $825, and another for $235, aggregating $1,060 for these services.

The appellant afterwards, on the 20th day of November, 1890, filed his petition in the circuit court of the United States for the eastern division of the eastern judicial district of Missouri, to recover, together with other claims, the said amount for his said services. In the appellant's said petition the aforesaid sums of $825 and $235 constituted the second and third counts, and the the said court adjudged that the appellant should recover the sums of $825 and $235 upon said counts.

From this judgment an appeal was taken by the United States to the circuit court of appeals for the eighth circuit, which court affirmed the judgment of the circuit court on the 25th day of June, 1892.

From the said judgment of the said circuit court of appeals the United States, on the 27th day of June, 1892, appealed to the Supreme Court of the United States, which appeal was, on the same day, allowed.

ASSIGNMENTS OF ERROR.

First. The court erred in affirming the judgment of the circuit court.

Second. The court erred in holding that the claimant is entitled to compensation for the services mentioned and

described in the second and third counts of the amended petition, and in the second finding of fact made by the circuit court.

Third. The court erred in holding that the circuit court had jurisdiction to ascertain and adjudge the amount of compensation, if any, to which claimant is entitled for the said services set out in said second and third counts of the amended petition.

I.

Our contention is that under no law of Congress is the claimant entitled to any compensation for the examination of alleged violations of United States laws relating to revenue where upon such inquiry and examination he shall commence no proceedings for fine, penalty, or forfeiture.

A studied effort has been made by the counsel for appellee, and also, we respectfully submit, by the learned judge who delivered the opinion of the court below, to show that such an interpretation of the law would be unjust and that Congress could not have intended to impose duties for which no pay is provided. We can see no force in such a contention, for almost every Congress passes laws which increase the duties of such officers, and if the duties so required are germane to the duties of the office, they must be performed without additional pay. In *United States* vs. *King* (147 U. S., 676), the court said, on page 679:

> The ordinary rule, in the absence of legislation, is that, if the statute increases the duties of an officer by the addition of other duties germane to his office, he must perform them without compensation.

It will not be denied by anyone that the duties required under section 838 that the district attorney should make examination of the cases reported to him of alleged violations of the revenue laws, are duties germane to his office. For such examinations followed afterwards by prosecution and trial, pay is provided, but where no prosecutions are instituted no pay is provided. Congress doubtless presumed that from the cases prosecuted ample remuneration would be obtained by the district attorney to render it unnecessary and unwise to make further compensation for the mere examination of cases where no cause of action existed.

But it can not be said, as a matter of fact, that the district attorney is required to perform these duties without pay, for by section 770 of the Revised Statutes the district attorneys of the United States, except for the districts of New York and California, receive pay for *extra services* at the rate of $200 per year, and in the term extra services may reasonably be included such duties as are imposed by law for which no specific pay is provided by section 824 or any other statute.

But the fairness or unfairness of the law, even granting for argument that the law is unwise and unfair, has nothing whatever to do with the issue. The question is, What is the law? The section, the interpretation of which is in dispute, reads as follows:

> Section 838. It shall be the duty of every district attorney to whom any collector of customs, or of internal revenue, shall report, according to law, any case in which any fine, penalty or forfeiture has been incurred in the district of such attorney for the vio-

> lation of any law of the United States relating to the revenue, to cause the proper proceedings to be commenced without delay, for the fines, penalties, and forfeitures in such case provided, unless, upon inquiry and examination, he shall decide that such proceedings can not probably be sustained, or that the ends of public justice do not require that such proceedings be instituted; in which case he shall report the facts in customs cases to the Secretary of the Treasury and in internal revenue cases to the commissioner of internal revenue for their direction. And for the expenses incurred and services rendered in all such cases, the district attorney shall receive and be paid from the Treasury such sum as the Secretary of the Treasury shall deem just and reasonable, upon the certificate of the judge before whom such cases are tried or disposed of: *Provided*, That the annual compensation shall not exceed the maximum amount prescribed by law, by reason of such allowance and payment.

This act was approved March 3, 1873 (17 Stat. L., 581). Its proper meaning and interpretation has been a question often passed upon by the Secretaries of the Treasury and the Attorney-General of the United States, and uniformly against the right to compensation. The learned judge in the opinion rendered by the court below, said:

> The fact that the Secretary of the Treasury since 1885 has been guided by the opinion then given by the Attorney-General, contrary to the views of the Solicitor of the Treasury, is not sufficient to prove an established departmental rule.

The court is in error in stating that the departmental practice on this question was commenced in 1885; on the

contrary, the disallowance of such items commenced with the passage of the act, and has continued uniform to the present time.

In 1874, August 29, Secretary Bristow, in ruling upon a question of this kind, in a claim presented by District Attorney Willey, of Cleveland, said:

> As the bill is wholly for services in cases where legal proceedings were not commenced, and which consequently were not tried or disposed of before any judge, it can not, as I understand the law, be paid. (Judiciary Book F–7, Treasury Dept., p. 50.)

Again, on December 9, 1874, in a letter to Calvin G. Childs, United States attorney at Stamford, Conn., in reply to the question whether any compensation could be allowed in nonprosecuted cases, he said:

> I am of the opinion that the law in question makes no provision for such cases. As you are aware, the Secretary of the Treasury can only make an allowance on the certificate of the judge before whom such cases are tried or disposed of. This phrase, as it seems to me, clearly contemplates official action by the judge, and can not be made to apply to an informal submission of the matter for his examination. (Judiciary Book F, Treasury Dept., p. 109.)

This ruling was adopted by Secretary Sherman in 1877 and continued without interruption and without being questioned until February 26, 1884, when it was reaffirmed by Secretary Folger, a distinguished jurist as well as statesman, who, in a letter to the First Comptroller, William Lawrence, said:

> My attention has been specially called to the question whether section 838 authorized any allowance

for services in cases not prosecuted. After carefully considering that section, it appears clear to me that there could be no jurisdiction in the Secretary, and hence, no power to make an allowance, unless there is a judge's certificate, *and that no judge could give the required certificate except in cases that are tried or disposed of before him.* (Book E, No. 37, p. 128, Secretary's Decisions, Treas'y Dept.)

On the 28th of February of the same year, Secretary Folger, in a letter to the Commissioner of Internal Revenue, said:

> My attention having recently been called to the proper construction of section 838, Revised Statutes, I have after careful consideration decided to reaffirm what I find to be the deliberate rulings of my predecessors in 1874 and 1877, viz: * * *
>
> Second. That said section does not allow compensation for services in cases not tried or disposed of before a judge. I am clearly of the opinion that the Secretary of the Treasury can have no jurisdiction and hence no power to make an allowance under that section, unless there is a judge's certificate, and that no judge can give the required certificate except in cases that have been tried or disposed of before him as judge.
>
> * * * * *
>
> Fourth. That each account presented under said section must be supported by the certificate of the proper judge that the cases named therein were tried or disposed of before him, and that the fee charged in each case is a just and reasonable one for the services rendered in the preparation of the trial.
>
> This is required because the phrase "before whom such cases are tried or disposed of," in my opinion, clearly contemplates *official* action by the judge, and

> can not be made to apply to an *informal* submission of a case for his recommendation. (30 Internal Revenue Record, p. 61.)

The above ruling is the one referred to by Judge Shiras in delivering the opinion of the court below.

Secretary Fairchild, in a letter dated December, 1886, to the United States district attorney at Waco, Texas, said:

> It is held that section 838 does not allow compensation for services in cases not tried or disposed of before a judge, but does allow compensation for expenses and services rendered preparatory to trial, in addition to the regular fees allowed under section 824, Revised Statutes, in cases that are tried and disposed of before a judge. Each account presented under said section must be supported by the certificate of the proper judge that the causes named therein were tried or disposed of before him and that the fee charged in each case is in his opinion a just and reasonable one for the services rendered. (32 Internal Rev. Record, 405.)

Attorney-General Brewster, in an opinion dated March 2, 1885 (see vol. 18, Opinions of Attorneys-General, 126), in answer to a letter from Secretary McCulloch, referring to him the question, "Whether section 838 of the Revised Statutes authorizes an allowance to be made to a district attorney for his services in internal-revenue cases reported to him, wherein, upon inquiry and examination, he has decided that the ends of justice do not require that judicial proceedings should be instituted and no proceedings have been instituted," said, among other things:

> Under the act of 1866 such allowance was limited to expenses incurred and services rendered in customs cases. The act of 1873 authorized a similar

allowance to be made in internal revenue cases as well as customs cases. The words "expenses incurred and services rendered *in all such cases*," as used in the latter act, were meant to include both customs cases and internal revenue cases; and that they were not meant to include cases (whether internal revenue or customs) in which no judicial proceedings have been instituted is shown by the context. Thus the Secretary of the Treasury is authorized to make an allowance for such expenses and services only upon the certificate of the judge before whom such cases are tried or disposed of. This language shows that in enlarging the act of 1866 so as to cover internal revenue cases the act of 1873 intended to retain the restrictions theretofore existing as to the cases in which allowances to the district attorneys should be made. The former act required "a certificate of the judge before whom such prosecution was had;" the latter act calls for a "certificate of the judge before whom such cases are tried or disposed of." The phraseology thus employed, which also occurs in sections 838 and 3085, Revised Statutes, *is of the same import.*

Attorney-General Garland, in a letter addressed to the Secretary of the Treasury, dated November 17, 1885, not published in the Opinions of Attorneys-General, but reported in 31 Internal Revenue Record, 382, said, among other things, in the case of the claim of C. C. Waters, United States attorney for the eastern district of Arkansas, for services in internal revenue cases in which the said attorney declined, after inquiry and examination, to institute proceedings:

> Sections 838 and 3085, Revised Statutes, bear upon this matter, and should be interpreted together as explanatory of each other. * * *

The second sentence of section 838 has been interpreted in different ways. The almost continuous interpretation given to it by the Secretaries of the Treasury *is reasonable and just.*

Without suggesting how the variant opinions above mentioned may be reconciled, it is sufficient to state that the two sections construed together maintain the established practice of your department.

If there shall, however, still remain a shadow of doubt, the Supreme Court of the United States has repeatedly decided that in cases of dissenting interpretation of a statute a departmental construction is entitled to most respectful consideration; that it ought not to be overruled without cogent reasons; that a practice early and long continued would be in the highest degree persuasive, if not absolutely controlling, in its effect, and has refused to interfere with such construction after it has been acted upon for a long time. (95 U. S., 763; 99 U. S., 269; 105 U. S., 695; 107 U. S., 406; 110 U. S., 221; 110 U. S., 485.)

In the case of Stanton *vs.* The United States, 37 Federal Reporter, 252, Judge Shipman, in a learned and able decision, said:

It is obvious that the payment provided by section 3085 is only where prosecutions have been actually commenced, and that section 838 was an enlargement of the preëxisting statute, so as to make its provisions applicable to internal-revenue cases also. Viewed in this historical light, the provisions in the two sections in regard to the payment for services are of the same character, and, notwithstanding the phraseology of section 838 is somewhat different from the preëxisting statute, I am of opinion that

it was not the intention of Congress to authorize payment for these services, unless prosecutions had been commenced.

The salient portions of section 838, relating to the district attorney, are that upon report of any collector he shall *cause proper proceedings to be commenced*, unless for certain reasons he shall deem them unadviseable, and shall receive for services and expenses in all *such cases* reasonable compensation in discretion of Secretary of Treasury upon certificate of the judge before whom *such cases* are tried and disposed of. The "*cases*" here referred to are clearly cases in the legal sense, namely, such as can be tried or disposed of before a court or judge. A case arises only when a question assumes such form that the judicial power is capable of acting upon it—when a subject is submitted to the court by a party asserting his rights in the form prescribed by law. (*Osborn* v. *U. S. Bank*, 9 Wheat., 738–819.)

Clearly an examination of suspicious circumstances and decision not to present a question to the court does not coustitute a "*case*" in this sense.

If Congress had intended, by the act of March 3, 1873, to repeal any part of the act of 1866, it would doubtless have made its intention clear. There is no word in the former act which can by any reasonable interpretation be held to be words of repeal, and no doctrine is better settled than that repeal by *implication* is not to be favored. Yet the whole argument on the other side has for its corner stone the implied repeal of the act of 1866 by the act of 1873. The United States Supreme Court, in 1st Black,

459, quoting and citing from a long list of authorities, said:

> A repeal by implication is not favored. The leaning of the courts is against this doctrine, if it be possible to reconcile the two acts of the legislature together.

We insist that the acts of 1866 and 1873, which now form sections 838 and 3085 of the Revised Statutes, are not only reconcilable, but are in no wise in conflict.

II.

We further insist that, even if claimant's construction of section 838 be adopted and he be held entitled to compensation for examinations where no proceedings were instituted, the same as in cases tried or disposed of by the court, no jurisdiction existed in the circuit court to entertain action for such compensation until the amount thereof deemed just and reasonable by the Secretary of the Treasury had been ascertained by the latter.

Whatever pay, if any, shall be granted for such services has been left by Congress entirely *to the discretion* of the Secretary of the Treasury, one of the executive officers of the Government. It was not left to any court to determine what amount ought to be paid to district attorneys for such services, and when the circuit court, in the first place, and the circuit court of appeals afterwards in affirming the judgment, determined, first, the amount which should be paid, namely, $5 for each case, and then formally entered judgment against the United States for this fixed and definite sum, they clearly usurped the prerogatives of the Secretary of the Treasury

to whose discretion alone this matter of compensation had been left by Congress in section 838 of the Revised Statutes. The discretion of the court was substituted for that of the Secretary of the Treasury where it was placed by Congress. To do this is to *make* law.

We think it has long been the well-settled law that the courts can only interpose in matters left to the executive officers of the Government when such officers refuse to exercise the discretion granted to them by acts of Congress, and then the proceedings can be by mandamus only, and are limited to a mere direction to the officer to exercise the discretion and not as to *how* he shall exercise it. Any directions by mandamus as to the method of its exercise would be overstepping the bounds of judicial authority. This well-settled doctrine is discussed by Mr. Justice Brown in the case of *Noble* vs. *Union River Logging Railroad Co.* (147 U. S., 165). In this case the court said, among other things:

> With regard to the judicial power in cases of this kind, it was held by this court as early as 1803, in the great case of *Marbury* vs. *Madison* (1 Cranch, 37), that there was a distinction between acts involving the exercise of judgment or discretion and those which are purely ministerial; that with respect to the former there exists and can exist *no power to control the executive discretion*, however erroneous its exercise may seem to have been.

In the case at bar the amount of the pay could have been fixed by the Secretary of the Treasury, had he felt warranted by the law in so doing, at the sum $10 for each case, for which amount the appellee first prepared his ac-

count, or $1 for each case, as he might in his discretion "deem just and reasonable."

And this discretion of the Secretary was coupled by Congress with a condition that the certificate of the judge before whom the cases are tried must be obtained. The only power or jurisdiction conferred upon any court in such cases as the present, is *to give the certificate of the judge thereof*, and any further jurisdiction of such cases is unwarranted and unlawful. By the operation of the judgment in this case, the Secretary of the Treasury is divested of his discretion. He can not, as authorized by the statute, fix the compensation at $1 or $10, or any other sum, for each of the cases, because the court has fixed it by a formal judgment, and thus rendered the United States liable in defiance of the Secretary, and his discretion is completely set at naught. We insist that the judgment entered in this case is a clear usurpation of judicial power, and, therefore, should be reversed and set aside. It is only under sections 827 and 4646, Revised Statutes, that such power can be exercised by the court as has been in this case.

We respectfully submit, therefore, that the judgement of the court below should be reversed.

J. E. DODGE,
Assistant Attorney-General.
JAMES H. NIXON,
Assistant Attorney.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

—IN THE—

SUPREME COURT OF THE UNITED STATES,

October Term, 1893.

THE UNITED STATES, APPELLANT,

vs.

THOMAS P. BASHAW, APPELLEE.

No. 779.

Appeal from the Judgment of the Circuit Court of Appeals for the Eighth Circuit, Eastern District of Missouri.

BRIEF AND ARGUMENT FOR APPELLEE.

MR. LEWIS E. STANTON,
MR. C. C. LANCASTER,
MR. J. W. EMERSON,
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1893.

THE UNITED STATES, *Appellant*,

vs.

THOMAS P. BASHAW, *Appellee*.

Appeal from the judgment of the Circuit Court of Appeals for the Eighth Circuit, Eastern District of Missouri.

Suit against the United States, brought in the Circuit Court of the United States by the present Appellee in order to recover certain amounts alleged to be due him on account of fees and expenditures for services rendered as United States District Attorney for the Eastern District of Missouri.

Brief of Mr. Lewis E. Stanton, Mr. C. C. Lancaster and Mr. J. W. Emerson, Counsel for Appellee, in support of his claim for compensation, under the provisions of section 838, R. S., for inquiry, examination, and report to the Commissioner of internal revenue, of certain internal revenue cases which were not prosecuted.

FACTS.

In the above entitled cause it appears from the record that the Appellee, the former District Attorney of the United States, located at St. Louis, Missouri, presented to the Secretary of the Treasury an account of $825.00 for services rendered and expenses incurred under section 838 R. S. in one hundred and sixty-five internal revenue cases, which he had decided, the ends of public justice did not require to be prosecuted. On March 13, 1889, this account was rejected by the Secretary of the Treasury, for the reason that, the cases were not tried or disposed of before a judge. Another account for $235.00 for services and expenses under the same section for examining and deciding not to prosecute forty-seven other internal revenue cases, was on the 18th of March, 1889, rejected by the secretary, for the reason that the cases were not tried or disposed of before a judge, and consequently no judge can give the certificate which the law requires, and which is necessary as the basis of the allowance by the secretary.

The Circuit Court found the allegations of the petition relating to these two counts to be true, and that the plaintiff had actually rendered the services as alleged, and that having inquired and examined into the above internal revenue cases, and having upon such inquiry and examination, decided that proceedings therein could not probably be sustained, and that the ends of justice did not require that such proceed-

ings should be instituted, he thereupon made a report of the facts in such cases to the commissioner of internal revenue for his direction. The court further finds that the services of the plaintiff are reasonably worth the sum of $5.00 in each of said cases, to wit: eight hundred and twenty-five dollars ($825.00), as alleged in the second count of the petition, and two hundred and thirty-five dollars, as averred in the third count of the petition ($235.00). Upon these facts the court rendered judgment in favor of the plaintiff to recover the two sums of money above mentioned. From this judgment an appeal was taken on behalf of the United States to the Circuit Court of Appeals for the Eighth Circuit, and the latter court affirmed the judgment of the Circuit Court in respect to these services and expenses arising under section 838. From the last mentioned judgment the present appeal is taken on behalf of the United States to this Court.

These cases are commonly called No. Pros. revenue cases. They are cases which the attorney has been compelled to examine, and upon which he is obliged to make a report, but which have never been prosecuted, for one of two reasons; *first*, because the proceedings probably could not be sustained; or *second*, because the ends of justice do not require that the party who may have violated the law shall be prosecuted.

POINTS.

I.

The ruling to the effect that a district attorney is entitled to no compensation for services rendered or expenses incurred under section 838, R. S., unless prosecutions are instituted, rests in part upon the practice in the treasury department, but mainly upon an opinion given by Attorney-General Brewster to Secretary McCulloch on March 2, 1885.

Opinions of Attorney General. Vol. 18, Page 126.

This was followed by another opinion of Attorney General Garland, to the Secretary of the Treasury, November 17, 1885. The latter opinion simply coincides with that of Attorney General Brewster, and practically adds nothing to the discussion, except that it calls attention to the respect which is due to a long settled practice of a department. It is reported in

Internal Revenue Record,

Vol. 31st, page 382.

In regard to the rule announced by Attorney General Brewster, we shall, with the highest respect for the memory and the judgment of that distinguished lawyer, contend that his opinion was incorrect.

He puts forth the surprising doctrine that a district attorney, a subordinate officer, may be positively commanded by his superiors, not only to perform

services, but also to incur expenses in the investigation of a criminal case, and then may be denied compensation and even the amount of his expenses, unless he shall decide to prosecute the person who has been accused.

The court will not forget that a district attorney is under the orders of the attorney general, the commissioner of internal revenue, and the secretary of the treasury. When these department officers command him to perform a certain service within his legal duty, he has no discretion but to obey. He cannot refuse obedience unless fees are secured to him. He must go forward and comply with the order, trusting to the law and to the justice of the government for his compensation. Besides, it is his official duty to perform this service without special orders.

It is not a mere perfunctory service. The attorney is obliged to look up evidence, and often to travel to distant points in order to find it.

Now, when the attorney makes a charge for his time and expenses, the attorney general replies to him, that he can get back nothing, whether for services or expenses, for the reason that he did not commence a prosecution against a citizen who, he found, had violated no federal law.

It is not believed that the court will sanction a rule so unreasonable as this.

The late attorney general attempts to justify it by a reference back to the obsolete act of 1866. That act

is section 3085 of the revised statutes. It is as follows:

"District attorneys, upon receiving the report of a collector, shall cause suit and prosecution to be commenced and prosecuted without delay for the fines and personal penalties by law in such case provided, unless upon inquiry and examination they shall decide that a conviction cannot probably be obtained, or that the ends of public justice do not require that a suit or prosecution shall be instituted, in which case they shall report the facts to the secretary of the treasury for his direction. For expenses incurred and services rendered in prosecutions for such fines and personal penalties, they shall receive such allowance as the secretary of the treasury shall deem just and reasonable, upon the certificate of the judge before whom such prosecution was had."

This is a part of the seventh section of a long act of forty-four sections, entitled "An act to prevent smuggling, and for other purposes," passed July 18, 1866, and found in Statutes at Large, vol. 14, page 178. It relates to customs cases. It expressly limits the payment of compensation to instances of "prosecution," upon the certificate of the particular judge "before whom such prosecution was had."

This section contained some notable defects. Not only was no compensation provided even for expenses, unless prosecutions had been commenced, but the right of the attorney to receive it was made to depend upon the certificate of the same judge before whom the prosecution was had. No provision was made for the contingency that a judge might die or resign, but the attorney must have the certificate of that judge before whom the prosecution was had.

Again, Congress has already provided compensa-

tion for prosecuted cases in the previous act known as the Fee Bill of 1853.

Section 824, R. S.

This section enacts full provisions for the compensation of the attorney in cases which are prosecuted by him before the courts.

The result, therefore, of the act of 1866 was to furnish a new and possibly different measure of payment, in prosecuted cases, although provision for them already existed, and to give none in cases not prosecuted, the very ones, wherein new labors were now to be imposed upon the attorney, and as to which no fees or repayment of expenses had been provided for by existing laws.

This section, however, stood for seven years, and then in 1873 Congress undertook to make a better one.

This is the act of March 3, 1873, vol. 17, page 581, Statutes at Large, and so much of it as relates to the duties and compensation of the attorney, appears in the revision as

Section 838, R. S.

In the first part of this new law it is enacted that internal revenue cases, as well as customs cases, shall be examined, decided upon, and either prosecuted or reported to the proper department by the attorney. That portion of the act which is material to the present question is in the following words:

"And for the expenses incurred and services rendered in all such cases, the district attorney shall receive and be paid from the treasury,

such sum as the secretary of the treasury shall deem just and reasonable, upon the certificate of the judge before whom such cases are tried or disposed of; *Provided*, That the annual compensation of such district attorney shall not exceed the maximum amount prescribed by law, by reason of such allowance and payment."

There was good reason for the enactment of these provisions. They were to apply, not merely to the districts where customs duties may happen to be collected, but to the internal revenue districts, at one time eighty-five in number, covering the whole country. The labors of the district attorneys were to be greatly increased. Expenses were now to be incurred by the attorneys in the investigation of an immense number of internal revenue cases of that class so well known to the officers, where "tax and penalty" have been paid. The attorney is now to inquire whether, in addition to payment of tax and penalty, the party should be prosecuted as having intentionally violated the law, or whether he is an old offender of whom example ought to be made, etc.

II.

At this point we shall maintain that section 3085 is virtually a repealed statute. It need not have been included in the revision at all. True, there is no repealing clause in the new act of 1873.

But Attorney-General Brewster admits in his opinion as follows:

"That section, (3085, passed in 1866), was wholly superseded by the amendatory act of 1873, which re-enacted the same provisions, sub-

stantially, and extended them to internal revenue cases. This act made it the duty of the district attorney upon the report of a collector of customs or the collector on internal revenue as the case may be."

Indeed a mere inspection of the two laws plainly enough shows that the new was intended to be a substitute for the old. It was intended to be a better law. It will require no argument or citation of authorities to establish in this court the proposition that a new act, plainly intended to cover the whole ground of the old one, repeals the older act, without any repealing clause.

"While repeals by implication are not favored, it is well settled that where two acts are not in all respects repugnant, if the latter covers the whole subject of the earlier and embraces new provisions which plainly show that it was intended as a substitute for the first, it will operate as a repeal."

King vs. Cornell, 106 U. S., 295 and 396;
United States vs. Tynen, 11 Wall, 88.

The court can now judge of the surprise of the district attorneys to find that the attorney general turned back to an old and obsolete law in order to find the meaning of it and then imported the construction of the ancient law into the new one.

It is quite clear that one prime object of passing the act of 1873 was to get rid of the defects and vices of the act of 1866.

One of these defects and vices was this, that it held out to the attorney a constant temptation to institute prosecutions in order to make fees.

This most unwise provision of the law is well

pointed out by District Judge Treat of the Eastern District of Missouri in the following language:

"It is obvious that if the district attorney, in order to accumulate fees, caused judicial proceedings to be instituted on every report so made, not he alone but other officers would devour the government or the accused with useless costs and expenses; hence the wise provisions of section 838."

In re Account of District Attorney, 23d Federal Reporter 26, see p. 27.

The Circuit Court of Appeals in the Eighth Circuit in sustaining the judgment rendered in the present cause, point out the same defect in the law, in the following language:

"Unless compelled to do so by clear and unambiguous language, we ought not to hold that the Congress of the United States in the enactment of a statute, clearly intended to protect the individual citizen, as well as the United States, against the institution of proceedings not called for in the furtherance of justice, warned the district attorneys of the United States that they could not expect compensation for the expenses incurred and the services rendered by them in making the examinations provided for in the statutes, unless they should find cause for the institution of proceedings. Such a construction would not only tend to defeat the very purpose of the enactment, but it would in effect, place the government in the attitude of making the question of compensation for the services rendered, depend not upon the fact of the rendition of the services, but upon the fact that the conclusion reached was in favor of the claim asserted by the government. That which is demanded of the district attorney by the section in question is examination into facts, and a determination of what public justice requires, which services are certainly judicial, or *quasi* judicial in their nature, and it is repugnant to all just principles that compensation for judicial services should ever be made dependent upon the results of the decision rendered."

United States *vs.* Bashaw, 50th Federal Reporter 749, see p. 751.

The difference between the two sections in these particulars is plain. Section 3085 speaks of services and expenses "in prosecutions." Section 838 refers to services and expenses "in all such cases." Section 3085 mentions the certificate of the judge "before whom such prosecution was had." Section 838 speaks of the certificate of the judge before whom such cases are "tried *or disposed of.*" The former act seems to refer to the particular prosecution, using the singular number, "prosecution was had," but the new one speaks of prosecutions generally, employing the plural, and the present tense, "such cases are tried," as if referring to any judge before whom the cases are customarily tried.

By what rule of construction, is the court to go back to the act of 1866, and in the face of these substituted provisions, say that the act of 1873 means the same thing as the act of 1866? The attorney general decides as to the meaning of a new law, by the curious process of reverting to the meaning of an old one, although he declares that the old one was entirely superseded by the new.

Upon this point our suggestion is that it is not sound construction or practice, to exhume from its grave the corpse of a dead statute, and having found what defects there were in it, to inject those defects into the body of a new and living law, amended for the very purpose of curing the former defects.

The only judicial decision, in which compensation under section 838, for services and expenses, is denied

to the attorney unless he shall institute prosecutions in revenue cases, is that of Judge Shipman,

Stanton *vs.* The United States,
37 Federal Reporter, 252.

This particular question was not thoroughly argued before Judge Shipman. It arose under two items at the end of a long bill of particulars filed in that case. It was simply submitted upon the opinion of the attorney general, and upon the judicial decision of Judge Treat above cited from 23d Federal Reporter, in which decision the right to compensation without the institution of prosecution had been sustained. This was done with confidence because the attorney supposed that the court would follow a judicial decision, and not the mere opinion of the head of a department.

The court will observe that the judge does not argue the matter at any length. He admits that if section 838 were the only one which relates or has related to the subject, the attorney might rely upon the decision of Judge Treat as correct. Then it is stated that the new section, 838, was an enlargement of a pre-existing statute. It is in the opinion further admitted that the language of the two sections is substantially different.

The judge, however, adds that it is obvious that the older section did not allow compensation unless prosecutions had been commenced, and that the two sections are to be "viewed in this historical light."

But with the utmost deference, we take leave to suggest that any "historical light" which reflects into a later statute the faults and defects of a former and superseded one, is a false light, and ought not to be followed by the court unless compelled to do so by clear words or some positive rule of construction.

Precisely, because the act of 1866 denied all compensation to the attorney unless he should institute a prosecution, and thus placed him under the constant temptation to multiply prosecutions in order to multiply fees, a new and better statute was passed.

It is said that the object of the act of 1873 was to extend the provisions of the act of 1866 to internal revenue cases. But there appears to be another purpose, which is to provide a more sensible rule of compensation, and no reason is given in the opinion why both objects should not be regarded.

III.

The point most strongly urged against the construction which allows compensation to the attorney, is the one stated by Secretary Folger, in 1884, as follows:

"I am of the opinion that the Secretary can have no jurisdiction and hence no power to make an allowance under that section, unless there is a judge's certificate, and that no judge can give the required certificate except in cases that have been tried or disposed of before him as judge."

The above ruling is substantially adopted in the opinion rendered in the case of Stanton *vs.* the United States heretofore cited.

This appears to be a superficial and erroneous reading of the statute.

In the first place, as suggested by the Circuit Court of Appeals, a judge may die or resign. This is enough to show that the certificate is not to be made in every instance by the identical judge who tried the case.

Again, not all prosecuted cases under the revenue laws reach the circuit or district courts, and this circumstance appears to have been overlooked. In the very opinion which adopts this reason of Secretary Folger, it is stated that fourteen internal revenue cases were prosecuted, and were by order of the commissioner of internal revenue compromised and settled while they were pending before the commissioner of the circuit court. They never reached the docket of any court over which an United States judge presides. Still they were prosecuted cases. and they were also revenue cases.

Stanton *vs.* the United States,
37, Federal Reporter, pages 258 and 259.

Now what judge is to certify under section 838 to the fees and expenses of the attorney? It is no answer to say that if a cause be prosecuted he may look to section 824. That section is not in question now. We are dealing with section 838, and the attorney has a right to appeal to it for his compensation.

The question therefore recurs, who is to certify to his bill? Is it not perfectly obvious, that it must be done by the judge within whose district, and within whose jurisdiction the cases arose?

Is the court to adopt such a narrow and literal reading of the statute as to hold that the district judge cannot in these fourteen prosecuted cases certify to the expenses of the attorney because the cases themselves never reached the docket of the court over which the judge presides?

Again, as suggested by the court from which this appeal was taken, cases may arise in a state, a territory, or the District of Columbia. Was it necessary to specify and describe all the judges who might make the certificate? Was it not enough to mention them as a class, and in this view do not the words mean those judges within whose district the cases arise, and who therefore are competent to try them?

An immense number of these cases, as the court well knows, are compromised without any trial whatever. Are they "disposed of" before a judge if they happen to reach the docket of his court, but not disposed of before him if they are compromised and settled while pending within his district before a commissioner of the Circuit Court?

The obvious answer to all these inquiries is, that such cases have come under the notice of the judicial officers, the moment they are reported to the attorney by the collector. They are then in the hands of the department of justice. They have arisen within the

territorial jurisdiction of a certain judge, and he or his successor is to certify to the expenses and compensation of the attorney.

The court below well remarks, that the fact that the judge has presided at the trial, gives him no information in regard to the previous services and expenses of the attorney, nor does any question concerning them arise on the trial.

Why or how is the judge who happened to preside at the trial of the defendant specially qualified to certify to the expenses of an attorney who has investigated the case?

The plain meaning of the law appears to be that the attorney must go to the judge of the proper district and make proof before him of the facts relating to his services and expenses, and this whether the cause was tried or otherwise disposed of.

One most curious result of the contrary construction is that as to internal revenue cases, the government compels the attorney to look to section 838 for the measure of his duties, and then refuses to permit him to look to the same section for his compensation.

The old law did not oblige him to examine and report internal revenue cases, but his duty in this respect arises under the new law. "Very well," says the attorney, "the new law gives me compensation for the new duty." "Oh, no," says the government, "so far as compensation is concerned you shall not look to

the new law, but you shall be governed by a construction derived from the old one, viz: section 3085."

Thus the department looks to the new act only in order to find duties for the attorney, and then turns back to the old statute in order to find a construction which will defeat him of his expenses and fees.

John Bunyan, in his simple but wonderful allegory of the Pilgrim's Progress, mentions a character whom he describes as Mr. Facing-both-ways. We venture the suggestion that the heads of department when dealing with subordinates, ought not to imitate this allegorical personage, but that they should face only one way. If the government orders the attorney to perform new duties under section 838, it should allow him to look to that section for the measure of his compensation, and should not turn him back to section 3085. Indeed as to internal revenue cases, he does not act under section 3085 at all.

No doubt words may sometimes occur in a law which cannot be taken in their literal sense, without defeating the purpose of the statute. In such case the particular words must, as pointed out by the Circuit Court of Appeals, yield to the main purpose. The general intent of a statute must control and particular words must yield to it.

As to the weight and drift of authorities in this case, it is enough simply to cite them. One judicial de-

cision sustains the position taken by the government. Opposed to this single authority stand the following:

In re Account of District Attorney, per Treat, J., 23d Fed. Reporter, 26.

Bashaw *vs.* United States, per Thayer, J., 47 Fed. Reporter, 40.

United States *vs.* Bashaw, per Shiras, J., 50 Fed. Reporter, 749.

Opinion of Hon. A. McCue, Solicitor of the Treasury, 1885.

Five federal judges have concurred in sustaining the doctrine that a district attorney is entitled to a fair compensation for services and expenses in these cases, even if prosecutions are not commenced.

The careful attention of the court is invited to these opinions and the reasons therein given.

Another question remains to be noticed. Attorney-General Garland in his opinion above cited from 31st Internal Revenue Record, virtually claims that a practice has obtained in the treasury department, and in the department of justice, to refuse this compensation, so long continued, that it ought not be disturbed.

Now it is certainly true, that at the very time this opinion was written, November 17, 1885, the department officers were not agreed upon the point.

On April 30, 1885, Hon. A. McCue, appointed from the State of New York, was the solicitor of the

treasury, and gave the following opinion, a copy of which was by the department furnished to us:

DEPARTMENT OF JUSTICE,
OFFICE OF THE SOLICITOR OF THE TREASURY.
WASHINGTON, D. C., April 30, 1885.

SIR:

I have examined the question referred to me, whether U. S. attorneys can be compensated under section 838, R. S., for the examinination of cases reported to them for prosecution and which after such examination they decide not to prosecute.

For such services U. S. attorneys have not heretofore been paid by the treasury department because it is held that under the provisions of this section, the cases examined for which compensation is claimed must be those which are subsequently tried or disposed of by the court upon the institution of judicial proceedings.

The language of the section on this point is:

> "and for the expenses incurred and services rendered in all such cases the district attorney shall receive and be paid from the treasury such sum as the secretary of the treasury shall deem just and reasonable, upon the certificate of the judge before whom such cases are tried or disposed of."

While this clause may in a very strict and technical view of the matter be so construed as to deny to U. S. attorneys the compensation in question, I think it is capable of a construction much more in accordance with the spirit of the act.

The evident intention of Congress was to require a careful examination by skilled attorneys of all cases of fines, penalties, or forfeitures reported to them for the purpose if possible of determining beforehand whether the ends of , ice required the bringing of suits, or whether the evidence would sustain such suits if brought, to the end that expensive and useless litigation may be prevented.

The presumption is that Congress did not intend that such examinations should be made without compensation and such a construction should not be adopted unless this act imperatively demands it.

It is however made a condition precedent to payment of the compensation in question that the required certificate be filed in the

treasury department. An examinatinon of the clause quoted shows that the first word "such" refers to all cases examined whether tried and disposed of or not.

The last word "such" in this clause does not refer to the particular cases examined by the U. S. attorney, It refers to the class of cases which the court has jurisdiction to try or dispose of. If the case examined belongs to this class, it is such a case as is tried or disposed of by the judge.

In other words the statute means to say if the cases examined are of a class which the court has jurisdiction to try and dispose of when brought, compensation may be made for the required examination on the proper certificate of the judge being filed.

This view is sustained by U. S. Judge Treat in an opinion recently given by him. If adopted it will undoubtedly have a tendency to carry out the intention of the act, and prevent frivolous suits which are oppressive to defendants and detrimental to the treasury.

I therefore recommend that in future a reasonable compensation be allowed to U. S. attorneys for this kind of service when the statutory certificate is filed. Very Respectfully,

HON. DANIEL MANNING,
Secretary of the Treasury.

A. MCCUE,
Solicitor of the Treasury.

In regard to the point that the certificate of the judge and of the secretary must concur in the allowance of compensation, it is enough to say that the secretary placed his refusal upon the sole ground that the allowance is not authorized by law. He made no claim that the amount of compensation allowed by the judge is unreasonable, and as to all matters of fact he has concurred with the judge.

The court below remarks, that "There cannot be any doubt of the burdens placed by the section upon the district attorney." To this we will add that there can be no doubt of the value of these services. By

sections 3083 and 3169 R. S., it appears that collectors of customs and of internal revenue are to report the facts in revenue cases respectively to the solicitor of the treasury and commissioner of internal revenue. Why this double report, one from the collector and one from the attorney? Because the report of the collector and of the attorney, when they arrive at the department office in Washington, operate each as a check upon the other.

The department officer can examine both reports, in regard to any given case, and ascertain whether they agree, and whether one gives any facts not contained in the other. Thus he has two sources of information, and he can determine with much correctness, whether all taxes and penalties have been paid, and whether there ought to be a prosecution. This is one of the devices, or safe-guards, which Congress has placed around the collection of the revenue. It is of high value to the government when making efforts to collect the whole amount of the taxes.

What possible motive can be ascribed to Congress for requiring the district attorney to render these laborious and important services without compensation? According to the reasoning of Attorney General Garland he must do this work when commanded, with no prospect of getting back even his expenses.

If it be true, as the late attorney general claims, that a rule has long prevailed, which is calculated to nullify as far as possible the wise provisions of section 838, then it is quite time that the attention of the

court should be called to the subject, and that it should know what regulations exist in the bureaus and departments of the government.

What is the practice which has become so venerable that it cannot be disturbed? Nothing more or less than to require the district attorney to obey a certain statute and perform services under it, and in effect, if not directly, to inform him that he must do this without compensation whether for labor or expenses, or resign his office.

That, stripped of disguises, is the custom referred to by Attorney General Garland.

If the court wishes to see what burdens are put in this manner upon a subordinate by his superiors, we will ask it to read the accounts or bills of particulars of these internal revenue cases, Exhibits A and B, filed by Mr. Bashaw in connection with his petition.

Record, pages 6, 7, 8, 9.

Now the usage to which Attorney General Garland refers, is simply to direct the district attorney to investigate every one of these cases, to take all pains necessary in order to ascertain the facts in each of them, to travel if necessary for the purpose, and to report the facts to the government, and then to refuse him compensation.

It may be well to have this venerable practice thoroughly understood. The court will judge whether the refusal of compensation to the attorneys has become so respectable with age that it cannot be cor-

rected, even if it is founded upon an erroneous construction of section 838.

No doubt an officer who is paid by a fee bill must bring his case within the statute. He cannot recover upon a mere *quantum meruit*. On the other hand, the statute is not to be turned against him by any forced construction. When a duty is laid upon him under a particular section of the statute, and he finds in the same section, that compensation is provided "in all such cases," he has a right to insist upon a full and fair application of those words in his favor.

Upon the whole case, Mr. Bashaw appears to have rendered services under section 838. The court has found that the services are reasonably worth the sum recovered. As to the further question, whether the statute provides compensation, the court has construed section 838 to mean simply what it says, and not what was said in some former statute. It appears to us that the court was entirely right in this, and that the judgment which the Appellee has obtained ought in respect to the second and third counts of the petition to be affirmed.

LEWIS E. STANTON,
C. C. LANCASTER,
AND J. W. EMERSON,
Counsel for Appellee.

Office Supreme Court U. S.
FILED.
DEC 27 1892
JAMES H. McKENNEY
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1892.

THE UNITED STATES, Appellant,

vs.

THOMAS P. BASHAW, Appellee.

No. 1120.

BRIEF OF MR. LEWIS E. STANTON,

Counsel for Appellee.

Appeal from the judgment of the Circuit Court of Appeals for the Eighth Circuit, Eastern District of Missouri.

Supreme Court of the United States,

OCTOBER TERM, 1892.

THE UNITED STATES, *Appellant*,

vs.

THOMAS P. BASHAW, *Appellee*.

Appeal from the judgment of the Circuit Court of Appeals for the Eighth Circuit, Eastern District of Missouri.

Suit against the United States, brought in the Circuit Court of the United States by the present Appellee in order to recover certain amounts alleged to be due him on account of fees and expenses for services rendered as United States District Attorney, for the Eastern District of Missouri.

Brief of Mr. Lewis E. Stanton of Hartford, Connecticut, on behalf of Appellee in support of his claim for compensation, under the provisions of section 838, R. S., for inquiry, examination, and report to the commissioner of internal revenue, of certain internal revenue cases which were not prosecuted.

FACTS.

In the above entitled cause it appears from the record that the Appellee, the former District Attorney of the United States, located at St. Louis, Missouri, presented to the Secretary of the Treasury an account of $825.00 for services rendered and expenses incurred under section 838 R. S. in one hundred and sixty-five internal revenue cases, which he had decided, the ends of public justice did not require to be prosecuted. On March 13, 1889, this account was rejected by the Secretary of the Treasury, for the reason that, the cases were not tried or disposed of before a judge. Another account for $235.00 for services and expenses under the same section for examining and deciding not to prosecute forty-seven other internal revenue cases, was on the 18th of March, 1889, rejected by the secretary, for the reason that the cases were not tried or disposed of before a judge, and consequently no judge can give the certificate which the law requires, and which is necessary as the basis of the allowance by the secretary.

The Circuit Court found the allegations of the petition relating to these two counts to be true, and that the plaintiff had actually rendered the services as alleged, and that having inquired and examined into the above internal revenue cases, and having upon such inquiry and examination, decided that proceedings therein could not probably be sustained, and that the ends of justice did not require that such proceedings should be instituted, he thereupon made a report of the facts in such cases to the commissioner of internal revenue for his direction. The court further finds that the services of the plaintiff are reasonably worth the sum of $5.00 in each of said cases, to wit: eight hundred and twenty-five dollars ($825.00), as alleged in the second count of the petition, and two hundred and thirty-five dollars, as averred in the third count of the petition ($235.00). Upon these facts the court rendered judgment in favor of the plaintiff to recover the two sums of money above

mentioned. From this judgment an appeal was taken on behalf of the United States to the Circuit Court of Appeals for the Eighth Circuit, and the latter court affirmed the judgment of the Circuit Court in respect to these services and expenses arising under section 838. From the last mentioned judgment the present appeal is taken on behalf of the United States to this Court.

The undersigned asks leave of the court to file a brief in the present cause in support of the claim of Mr. Bashaw, for compensation for services under section 838 as above set forth, for the following reasons. The undersigned was a district attorney of the United States for the district of Connecticut, from January 2, 1885, to April 2, 1888. After retiring from office he brought a suit against the United States in order to recover fees and expenses alleged to be due to him as attorney, for services rendered. An opinion was filed in the cause, in which the court, Shipman J. found that the petitioner was entitled to recover the sum of $1611.82. But a further item of $1145.00 for the examination of 192 internal revenue cases, and 37 customs revenue cases at $5.00 each was rejected by the court. No final judgment in that case has ever been entered, and the question what judgment shall be rendered, depends upon the decision of this court in regard to the right of a district attorney to compensation for inquiry, examination and report to the secretary of the treasury, or commissioner of internal revenue of cases reported to him by a collector. That question arises upon the present appeal.

These cases are commonly called No. Pros. revenue cases. They are cases which the attorney has been compelled to examine, and upon which he is obliged to make a report, but which have never been prosecuted, for one of two reasons; *first*, because the proceedings probably could not be sustained; or *second*, because the ends of justice do not require that the party who may have violated the law shall be prosecuted.

The facts and opinion in the last mentioned case appear in,

Stanton *vs.* The United States,
37 Federal Reporter 252.

POINTS.

I.

The ruling to the effect that a district attorney is entitled to no compensation for services rendered or expenses incurred under section 838, R. S., unless prosecutions are instituted, rests in part upon the practice in the treasury department, but mainly upon an opinion given by Attorney-General Brewster to Secretary McCulloch on March 2, 1885.

Opinions of Attorney General. Vol. 18, Page 126.

This was followed by another opinion of Attorney General Garland, to the Secretary of the Treasury, November 17, 1885. The latter opinion simply coincides with that of Attorney General Brewster, and practically adds nothing to the discussion, except that it calls attention to the respect which is due to a long settled practice of a department. It is reported in

Internal Revenue Record,
Vol. 31st, page 382.

In regard to the rule announced by Attorney General Brewster, I shall, with the highest respect for the memory and the judgment of that distinguished lawyer, contend that his opinion was incorrect.

He puts forth the surprising doctrine that a district attorney, a subordinate officer, may be positively commanded by his superiors, not only to perform services, but also to incur expenses in the investigation of a criminal case, and then may be denied compensation and even the amount of his expenses, unless he shall decide to prosecute the person who has been accused.

The court will not forget that a district attorney is under the orders of the attorney general, the commissioner of internal revenue, and the secretary of the treasury. When these de-

partment officers command him to perform a certain service within his legal duty, he has no discretion but to obey. He cannot refuse obedience unless fees are secured to him. He must go forward and comply with the order, trusting to the law and to the justice of the government for his compensation.

It may not be improper to state, that the former Connecticut district attorney, who is making this brief, made the very question, before investigating and reporting upon those No. Pros. cases, that he ought not to be called on to do it without compensation. This he did in order to save his rights, or at least not to waive them. But the department sent back its positive order, in effect as follows: "Examine all those cases, and decide whether they shall be prosecuted. If you decide against a prosecution, then report the facts to us as required by statute."

Upon this state of facts, the attorney general gravely announces that the attorney has no right, after he has fully obeyed the orders of the government, to get back even his necessary expenses, and this because he decided under the responsibilities of his office and oath that certain accused men ought not to be prosecuted.

It is not a mere perfunctory service. The attorney is obliged to look up evidence, and often to travel to distant points in order to find it. To illustrate: A collector once reported to me a merchant of New Haven as having violated the tax laws relating to oleomargarine. But a trip from Hartford to New Haven, and one day spent on the investigation, disclosed the fact that the dealer had paid all the federal taxes, and affixed all the tax stamps required by the act of Congress. He had indeed violated the state law by advertising his oleomargarine as genuine butter, but the federal authorities had no case at all against him. The facts were duly reported to the commissioner, and no prosecution directed.

Now, when the attorney makes a charge for his day and expenses, the attorney general replies to him, that he can get

back nothing, whether for services or expenses, for the reason that he did not commence a prosecution against a citizen who had violated no federal law.

It is not believed that the court will sanction a rule so unreasonable as this.

The late attorney general attempts to justify it by a reference back to the obsolete act of 1866. That act is section 3085 of the revised statutes. It is as follows:

"District attorneys, upon receiving the report of a collector, shall cause suit and prosecution to be commenced and prosecuted without delay for the fines and personal penalties by law in such case provided, unless upon inquiry and examination they shall decide that a conviction cannot probably be obtained, or that the ends of public justice do not require that a suit or prosecution shall be instituted, in which case they shall report the facts to the secretary of the treasury for his direction. For expenses incurred and services rendered in prosecutions for such fines and personal penalties, they shall receive such allowance as the secretary of the treasury shall deem just and reasonable, upon the certificate of the judge before whom such prosecution was had."

This is a part of the seventh section of a long act of forty-four sections, entitled "An act to prevent smuggling, and for other purposes," passed July 18, 1866, and found in Statutes at Large, vol. 14, page 178. It relates to customs cases. It expressly limits the payment of compensation to instances of "prosecution," upon the certificate of the particular judge "before whom such prosecution was had."

This section contained some notable defects. Not only was no compensation provided even for expenses, unless prosecutions had been commenced, but the right of the attorney to receive it was made to depend upon the certificate of the same judge before whom the prosecution was had. No provision was made for the contingency that a judge might die or resign, but the attorney must have the certificate of that judge before whom the prosecution was had.

Again, Congress had already provided compensation for prosecuted cases in the previous act known as the Fee Bill of 1853.

Section 824, R. S.

This section enacts full provisions for the compensation of the attorney in cases which are prosecuted by him before the courts.

The result, therefore, of the act of 1866 was to furnish a new and possibly different measure of payment, in prosecuted cases, although provision for them already existed, and to give none in cases not prosecuted, the very ones, wherein new labors were now to be imposed upon the attorney, and as to which no fees or repayment of expenses had been provided for by existing laws.

This section, however, stood for seven years, and then in 1873, Congress undertook to make a better one.

This is the act of March 3, 1873, vol. 17, page 581, Statutes at Large, and so much of it as relates to the duties and compensation of the attorney, appears in the revision as

Section 838, R. S.

In the first part of this new law, it is enacted that internal revenue cases, as well as customs cases, shall be examined, decided upon, and either prosecuted or reported to the proper department by the attorney. That portion of the act which is material to the present question is in the following words:

"And for the expenses incurred and services rendered in all such cases, the district attorney shall receive and be paid from the treasury, such sum as the secretary of the treasury shall deem just and reasonable, upon the certificate of the judge before whom such cases are tried or disposed of; *Provided*, That the annual compensation of such district attorney shall not exceed the maximum amount prescribed by law, by reason of such allowance and payment."

There was good reason for the enactment of these provisions. They were to apply, not merely to the districts where customs duties may happen to be collected, but to the internal revenue districts, at one time eighty-five in number, covering the whole country. The labors of the district attorneys were to be greatly increased. Expenses were now to be incurred by the attorneys in the investigation of an immense number of internal revenue cases of that class so well known to the officers, where "tax

and penalty" have been paid. The attorney is now to inquire whether, in addition to payment of tax and penalty, the party should be prosecuted as having intentionally violated the law, or whether he is an old offender of whom an example ought to be made, etc.

II.

At this point I shall maintain that section 3085 is virtually a repealed statute. It need not have been included in the revision at all. True, there is no repealing clause in the new act of 1873.

But Attorney-General Brewster admits in his opinion as follows:

"That section, (3085, passed in 1866), was wholly superseded by the amendatory act of 1873, which re-enacted the same provisions, substantially, and extended them to internal revenue cases. This act made it the duty of the district attorney upon the report of a collector of customs or the collector on internal revenue as the case may be."

Indeed a mere inspection of the two laws plainly enough shows that the new was intended to be a substitute for the old. It was intended to be a better law. It will require no argument or citation of authorities to establish in this court the proposition that a new act, plainly intended to cover the whole ground of the old one, repeals the older act, without any repealing clause.

"While repeals by implication are not favored, it is well settled that where two acts are not in all respects repugnant, if the latter covers the whole subject of the earlier and embraces new provisions which plainly show that it was intended as a substitute for the first, it will operate as a repeal."

King *vs.* Cornell, 106 U. S. 395 and 396.
United States *vs.* Tynen, 11 Wall, 88.

The court can now judge of the surprise of the district attorneys to find that the attorney general turned back to an old

and obsolete law in order to find the meaning of it and then imported the construction of the ancient law into the new one.

It is quite clear that one prime object of passing the act of 1873 was to get rid of the defects and vices of the act of 1866.

One of these defects and vices was this, that it held out to the attorney a constant temptation to institute prosecutions in order to make fees.

This most unwise provision of the law is well pointed out by District Judge Treat of the Eastern District of Missouri in the following language:

"It is obvious that if the district attorney, in order to accumulate fees, caused judicial proceedings to be instituted on every report so made, not he alone but other officers would devour the government or the accused with useless costs and expenses; hence the wise provisions of section 838."

In re Account of District Attorney, 23d Federal Reporter 26, see p. 27.

The Circuit Court of Appeals in the Eighth Circuit in sustaining the judgment rendered in the present cause, point out the same defect in the law, in the following language:

"Unless compelled to do so by clear and unambiguous language, we ought not to hold that the Congress of the United States in the enactment of a statute, clearly intended to protect the individual citizen, as well as the United States, against the institution of proceedings not called for in the furtherance of justice, warned the district attorneys of the United States that they could not expect compensation for the expenses incurred and the services rendered by them in making the examinations provided for in the statutes, unless they should find cause for the institution of proceedings. Such a construction would not only tend to defeat the very purpose of the enactment, but it would in effect, place the government in the attitude of making the question of compensation for the services rendered, depend not upon the fact of the rendition of the services, but upon the fact that the conclusion reached was in favor of the claim asserted by the government. That which is demanded of the district attorney by the section in question is examination into facts, and a determination of what public justice requires, which services are certainly judicial, or *quasi* judicial in their nature, and it is repugnant to all just principles that compensation for judicial services should ever be made dependent upon the results of the decision rendered."

United States *vs.* Bashaw, 50th Federal Reporter 749, see p. 751.

The difference between the two sections in these particulars is plain. Section 3085 speaks of services and expenses "in

prosecutions." Section 838 refers to services and expenses "in all such cases." Section 3085 mentions the certificate of the judge "before whom such prosecution was had." Section 838 speaks of the certificate of the judge before whom such cases are "tried *or disposed of*." The former act seems to refer to the particular prosecution, using the singular number, "prosecution was had," but the new one speaks of prosecutions generally, employing the plural, and the present tense, "such cases are tried," as if referring to any judge before whom the cases are customarily tried.

By what rule of construction, is the court to go back to the act of 1866, and in the face of these substituted provisions, say that the act of 1873 means the same thing as the act of 1866. The attorney general decides as to the meaning of a new law, by the curious process of reverting to the meaning of an old one, although he declares that the old one was entirely superseded by the new.

Upon this point my suggestion is that it is not sound construction or practice, to exhume from its grave the corpse of a dead statute, and having found what defects there were in it, to inject those defects into the body of a new and living law.

The only judicial decision, in which compensation under section 838, for services and expenses, is denied to the attorney unless he shall institute prosecutions in revenue cases, is that of Judge Shipman,

Stanton *vs.* The United States,
37 Federal Reporter, 252.

This particular question was not thoroughly argued before Judge Shipman. It arose under two items at the end of a long bill of particulars filed in that case. It was simply submitted upon the opinion of the attorney general, and upon the judicial decision of Judge Treat above cited from 23d Federal Reporter, in which decision the right to compensation without the institution of prosecution had been sustained. This was

done with confidence because the attorney supposed that the court would follow a judicial decision, and not the mere opinion of the head of a department.

The court will observe that the judge does not argue the matter at any length. He admits that if section 838 were the only one which relates or has related to the subject, the attorney might rely upon the decision of Judge Treat as correct. Then it is stated that the new section, 838, was an enlargement of a pre-existing statute. It is in the opinion further admitted that the language of the two sections is substantially different.

The judge, however, adds that it is obvious that the older section did not allow compensation unless prosecutions had been commenced, and that the two sections are to be "viewed in this historical light."

But with the utmost deference, I take leave to suggest that any "historical light" which reflects into a later statute the faults and defects of a former and superseded one, is a false light, and ought not to be followed by the court, unless compelled to do so by clear words or some positive rule of construction.

Precisely, because the act of 1866 denied all compensation to the attorney unless he should institute a prosecution, and thus placed him under the constant temptation to multiply prosecutions in order to multiply fees, a new and better statute was passed.

It is said that the object of the act of 1873 was to extend the provisions of the act of 1866 to internal revenue cases. But there appears to be another purpose, which is to provide a more sensible rule of compensation, and no reason is given in the opinion why both objects should not be regarded.

III.

The point most strongly urged against the construction which allows compensation to the attorney, is the one stated by Secretary Folger, in 1884, as follows:

> "I am of the opinion that the secretary can have no jurisdiction, and hence no power to make an allowance under that section, unless there is a judge's certificate, and that no judge can give the required certificate except in cases that have been tried or disposed of before him as judge."

The above ruling is substantially adopted in the opinion rendered in the case of Stanton *vs.* the United States heretofore cited.

This appears to be a superficial and erroneous reading of the statute.

In the first place, as suggested by the Circuit Court of Appeals, a judge may die or resign. This is enough to show that the certificate is not to be made in every instance by the identical judge who tried the case.

Again, not all prosecuted cases under the revenue laws reach the circuit or district courts, and this circumstance appears to have been overlooked. In the very opinion which adopts this reason of Secretary Folger, it is stated that fourteen internal revenue cases were prosecuted, and were by order of the commissioner of internal revenue compromised and settled while they were pending before the commissioner of the circuit court. They never reach the docket of any court over which an United States judge presides. Still they were prosecuted cases, and they were also revenue cases.

Stanton *vs.* the United States,
37, Federal Reporter, pages 258 and 259.

Now what judge is to certify under section 838 to the fees and expenses of the attorney? It is no answer to say that if a cause be prosecuted he may look to section 824. That section is not in question now. We are dealing with section 838, and the attorney has a right to appeal to it for his compensation.

The question therefore recurs, who is to certify to his bill? Is it not perfectly obvious, that it must be done by the judge within whose district, and within whose jurisdiction the cases arose?

Is the court to adopt such a narrow and literal reading of the statute as to hold that the district judge cannot in these fourteen prosecuted cases certify to the expenses of the attorney because the cases themselves never reached the docket of the court over which the judge presides?

Again, as suggested by the court from which this appeal was taken, cases may arise in a state, a territory, or the District of Columbia. Was it necessary to specify and describe all the judges who might make the certificate? Was it not enough to mention them as a class, and in this view do not the words mean those judges within whose district the cases arise, and who therefore are competent to try them?

An immense number of these cases, as the court well knows, are compromised without any trial whatever. Are they "disposed of" before a judge if they happen to reach the docket of his court, but not disposed of before him if they are compromised and settled while pending within his district before a commissioner of the Circuit Court?

The obvious answer to all these inquiries is, that such cases have come under the notice of the judicial officers, the moment they are reported to the attorney by the collector. They are then in the hands of the department of justice. They have arisen within the territorial jurisdiction of a certain judge, and he or his successor is to certify to the expenses and compensation of the attorney.

The court below well remarks, that the fact that the judge has presided at the trial, gives him no information in regard to the previous services and expenses of the attorney, nor does any question concerning them arise on the trial.

Why or how is the judge who happened to preside at the trial of the defendant specially qualified to certify to the expenses of an attorney who has investigated the case?

The plain meaning of the law appears to be that the attorney must go to the judge of the proper district and make proof before him of the facts relating to his services and expenses, and this whether the cause was tried or otherwise disposed of.

One most curious result of the contrary construction is that as to internal revenue cases, the government compels the attorney to look to section 838 for the measure of his duties, and then refuses to permit him to look to the same section for his compensation.

The old law did not oblige him to examine and report internal revenue cases, but his duty in this respect arises under the new law. "Very well," says the attorney, "the new law gives me compensation for the new duty." "Oh no," says the government, "so far as compensation is concerned you shall not look to the new law, but you shall be governed by a construction derived from the old one, viz.: section 3085.

Thus the department looks to the new act only in order to find duties for the attorney, and then turns back to the old statute in order to find a construction which will defeat him of his expenses and fees.

John Bunyan, in his simple but wonderful allegory of the Pilgrim's Progress mentions a character whom he describes as Mr. Facing-both-ways. I venture the suggestion that the heads of department when dealing with subordinates, ought not to imitate this allegorical personage, but that they should face only one way. If the government orders the attorney to perform new duties under section 838, it should allow him to look to that section for the measure of his compensation, and should not turn him back to section 3085. Indeed as to internal revenue cases, he does not act under section 3085 at all.

No doubt words may sometimes occur in a law which cannot be taken in their literal sense, without defeating the purpose of the statute. In such case the particular words must as pointed out by the Circuit Court of Appeals, yield to the main purpose. The general intent of a statute must control, and particular words must yield to it.

As to the weight and drift of authorities in this case, it is enough simply to cite them. One judicial decision sustains the position taken by the government. Opposed to this single authority stand the following:

In re Account of District Attorney, per Treat, J., 23d Fed. Reporter, 26.

Bashaw *vs* United States, per Thayer, J., 47 Fed. Reporter 40.

United States *vs*. Bashaw, per Shiras, J., 50 Fed. Reporter 749.

Five federal judges have concurred in sustaining the doctrine that a district attorney is entitled to a fair compensation for services and expenses in these cases, even if prosecutions are not commenced.

The careful attention of the court is invited to these opinions and the reasons therein given.

Another question remains to be noticed. Attorney-General Garland in his opinion above cited from 31st Internal Revenue Record, virtually claims that a practice has obtained in the treasury department, and in the department of justice, to refuse this compensation, so long continued, that it ought not be disturbed.

Now it is certainly true, that at the very time this opinion was written, November 17, 1885, the department officers were not agreed upon the point.

On April 30, 1885, Hon. A. McCue appointed from the State of New York, was the solicitor of the treasury, and gave the following opinion, a copy of which was by the department furnished to me.

DEPARTMENT OF JUSTICE,
OFFICE OF THE SOLICITOR OF THE TREASURY.
WASHINGTON, D. C., April 30, 1885.

SIR:

I have examined the question referred to me, whether U. S. attorneys can be compensated under section 838, R. S., for the examination of cases reported to them for prosecution and which after such examination they decide not to prosecute.

For such services U. S. attorneys have not heretofore been paid by the treasury department because it is held that under the provisions of this section, the cases examined for which compensation is claimed must be those which are subsequently tried or disposed of by the court upon the institution of judicial proceedings.

The language of the section on this point is:

> "and for the expenses incurrred and services rendered in all such cases the district attorney shall receive and be paid from the treasury such sum as the secretary of the treasury shall deem just and reasonable, upon the certificate of the judge before whom such cases are tried or disposed of."

While this clause may in a very strict and technical view of the matter be so construed as to deny to U. S. attorneys, the compensation in question, I think it is capable of a construction much more in accordance with the spirit of the act.

The evident intention of Congress was to require a careful examination by skilled attorneys of all cases of fines, penalties, or forfeitures reported to them for the purpose if possible of determining beforehand whether the ends of justice required the bringing of suits, or whether the evidence would sustain such suits if brought, to the end that expensive and useless litigation may be prevented.

The presumption is that Congress did not intend that such examinations should be made without compensation and such a construction should not be adopted unless this act imperitively demands it.

It is however made a condition precedent to payment of the compensation in question that the required certificate be filed in the treasury department. An examination of the clause quoted shows that the first word "such" refers to all cases examined whether tried and disposed of or not.

The last word "such" in this clause does not refer to the particular cases examined by the U. S. attorney. It refers to the class of cases which the court has jurisdiction to try or dispose of. If the case examined belongs to this class, it is such a case as is tried or disposed of by the judge.

In other words the statute means to say if the cases examined are of a class which the court has jurisdiction to try and dispose of when brought, compensation may be made for the required examination on the proper certificate of the judge being filed.

This view is sustained by U.S. Judge Treat in an opinion recently given by him. If adopted it will undoubtedly have a tendency to carry out the intention of the act, and prevent frivolous suits which are oppressive to defendants and detrimental to the treasury.

I therefore recommend that in future a reasonable compensation be allowed to U. S. attorneys for this kind of service when the statutory certificate is filed.

Very respectfully,

A. MCCUE,
Solicitor of the Treasury.

HON. DANIEL MANNING,
Secretary of the Treasury.

In regard to the point that the certificates of the judge and of the secretary must concur in the allowance of compensation, it is enough to say that the secretary placed his refusal upon the sole ground that the allowance is not authorized by law. He made no claim that the amount of compensation allowed by the judge is unreasonable, and as to all matters of fact he has concurred with the judge.

The court below remarks, that "There cannot be any doubt of the burdens placed by the section upon the district attorney." To this I will add that there can be no doubt of the value of these services. By sections 3083 and 3169, R. S., it appears that collectors of customs and of internal revenue are to report the facts in revenue cases respectively to the solicitor of the treasury and commissioner of internal revenue. Why this double report, one from the collector and one from the attorney? Because the report of the collector and of the attorney, when they arrive at the department office in Washington, operate each as a check upon the other.

The department officer can examine both reports, in regard to any given case, and ascertain whether they agree, and whether one gives any facts not contained in the other. Thus he has two sources of information, and he can determine with much correctness, whether all taxes and penalties have been paid, and whether there ought to be a prosecution. This is one of the devices, or safe-guards, which Congress has placed around the collection of the revenue. It is of high value to the government when making efforts to collect the whole amount of the taxes.

What possible motive can be ascribed to Congress for requiring the district attorney to render these laborious and important services without compensation? According to the reasoning of Attorney General Garland, he must do this work when commanded, with no prospect of getting back even his expenses.

If it be true, as the late attorney general claims, that a rule has long prevailed, which is calculated to nullify as far as possible the wise provisions of section 838, then it is quite time that the attention of the court should be called to the subject, and that it should know what regulations exist in the bureaus and departments of the government.

What is the practice which has become so venerable that it cannot be disturbed? Nothing more or less than to require the district attorney to obey a certain statute and perform services under it, and in effect, if not directly, to inform him that he must do this without compensation whether for labor or expenses, or resign his office.

That, stripped of disguises, is the custom referred to by Attorney General Garland.

If the court wishes to see what burdens are put in this manner upon a subordinate by his superiors, I will ask it to read the accounts or bills of particulars of these internal revenue cases, Exhibits A and B, filed by Mr. Bashaw in connection with his petition.

Record, pages 6, 7, 8, 9.

Now the usage to which Attorney General Garland refers, is simply to direct the district attorney to investigate every one of these cases, to take all pains necessary in order to ascertain the facts in each of them, to travel if necessary for the purpose, and to report the facts to the government, and then to refuse him compensation.

It may be well to have this venerable practice thoroughly understood. The court will judge whether the refusal of compensation to the attorneys has become so respectable with age that it cannot be corrected, even if it is founded upon an erroneous construction of section 838.

No doubt an officer who is paid by a fee bill must bring his case within the statute. He cannot recover upon a mere *quan-*

tum meruit. On the other hand, the statute is not to be turned against him by any forced construction. When a duty is laid upon him under a particular section of the statute, and he finds in the same section, that compensation is provided "in all such cases," he has a right to insist upon a full and fair application of those words in his favor.

Upon the whole case, Mr. Bashaw appears to have rendered services under section 838. The court has found that the services are reasonably worth the sum recovered. As to the further question, whether the statute provides compensation, the court has construed section 838 to mean simply what it says, and not what was said in some former statute. It appears to me that the court was entirely right in this, and that the judgment which the Appellee has obtained ought in respect to the second and third counts of the petition to be affirmed.

LEWIS E. STANTON,
Counsel for Appellee.

HARTFORD, CONN., Dec. 20, 1892.